United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 74-1941

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff, Appellee

VS.

NICHOLAS D. ZINNI ET AL,
Defendant, Appellant

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR DEFENDANT-APPELLANT

(From Judgment and Sentence)

By His Counsel,

C. Thomas Zinni
53 Mount Vernon Street
Boston, Massachusetts 02108

Charles P. Ferland
275 North Main Street
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TABLE OF CONTENTS

	Page
Question Presented.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Argument.....	5
I. The Trial Court's Error in Denying Appellant Zinni's Motions (A) for Judgment of Acquital due to the Insufficiency of the Evidence to Sustain a Conviction, (1) at the Conclusion of the Government's Case, and (2) at the Conclusion of All of the Evidence, and (3) Following Conviction to Set Aside the Verdict and Enter Judgment of Acquital and (B) For a New Trial Pursuant to Rules 29 (a),(b),and (c), and 33, Respectively of the Federal Rules of Criminal Procedure, Deprived the Appellant of His Guarantees Pursuant to the Sixth and Fourteenth Amendments to the United States Constitution.....	5
II. The Trial Court's Ruling, Admitting into Evidence Certain Tape Recordings and Their Contents and Written Transcriptions Thereof, Deprived the Appellant Zinni of His Constitutional Guarantees Pursuant to the Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.....	38
III. The Trial Court's Ruling Denying Co-defendant David Guillette's Pretrial Motion to Suppress Deprived the Appellant Zinni of His Constitutional Guarantees Pursuant to the Fourth , Sixth, and Fourteenth Amendment of the United States Constitution.....	60
IV. The Trial Court's Error in Denying Appellant's Motion to Dismiss Count I of the Indictment for Lack of Jurisdiction Deprived the Appellant of His Guarantees Pursuant to Fifth Sixth and Fourteenth Amendments to the United States Constitution.....	64
V. The Trial Court Erred in Denying Appellant's Motion (A) to Dismiss the Indictment on the Ground that Appellant Was Indicted by a Biased Grand Jury and (B) to Conduct a Voir Dire Examination of Each Grand Juror as to Any Bias or Prejudice against the Appellant and His Co-defendants.....	66
VI. The Trial Court's Ruling Holding Inadmissible A Hearsay Declaration by Anthony Souca that He Killed Daniel LaPolla Denied Appellant Zinni a Fair Trial Guaranteed by the Sixth Amendment of the United States Constitution.....	67
VII. The Trial Court's Denial of Appellant Zinni's Motion for Severance Under Rule 14 so Prejudiced the Trial that it Denied the Appellant a Fair Trial Guaranteed Under the Fifth	

Page

and Sixth Amendment of the Constitution of the United States..... 68

VIII. The Trial Court's Answer and Supplemental Charge to the Jury in Response to the June 12, 1974, Jury Question on Withdrawal so Prejudiced, Confused, and Tainted the Jury's Deliberation That it was a Denial of the Due Process Guaranteed by the Sixth Amendment to the Constitution to the United States.... 85

Conclusion..... 89

Anderson v. United States ,94 S.Ct. 2253 (1974)..... 64

Brady v. Maryland, 373, U.S. 83, 83 S.Ct.1194 10 L.Ed. 2d 215 (1963)..... 88

Bruton v. United States 391 U.S. 123, 88 S.Ct. 1620..... 83

Bryan v. United States (1950) 338 U.S. 552, 70 S.Ct. 317.... 7

Commonwealth v. Kluska 3 A.2d 398 (1939--Pa)..... 45

Commonwealth v. Weeden (Penna 7/1/74) 15 Cr.L.Rptr. 2371.... 60

Cupp v. Naughten 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed. 2d 368 (1973)..... 88

Hyde v. United States, 225 U.S. 347, 366,32 S.Ct. 793 803 56 L.Ed. 1114 (1912)..... 85

Jones v. United States,362,U.S.261..... 60

Kempe v. United States 151 F.2d 680 (2nd Cir. 1945)..... 53

Kotteakos v. United States 328 U.S. 750 68 S.Ct. 1239, 90 L.Ed. 1557 (1946)..... 75

Kraft v. United States 238, F.2d 129 (8th Cir. 1969)..... 47

Kruluvich v. United States 336 U.S. 440 69 S.Ct. 716, 93 L.Ed. 790 (1949)..... 78

Labiosa v. Government of the Canal Zone , 198 F.2d 282 (5th Cir. 1952) 47

LaFrance v. Bohlinger, 499, F.2d 29 (1st Cir.1974)..... 61

McDonald v. United States, 335 U.S. 469 60

	Page
Michelson v. United States, 338 U.S. 469 (1948).....	53
People v. Cahan, 44 Cal 2d 434, 282 P.2d 905.....	60
People v. Glass 158 Cal 650,112 P. 281 (1910).....	45
People v. Whalen, 160 P2d 560 (1945)	45
People v. Martin , 45 Cal 2d 775,290 P.2d 885.....	60
People v. Smith, 230 N.Y.S. 2d 894 (1962).....	60
Salzman v. United States, 405 F.2d 358,131 U.S. App.D.C. 393 (D.C. Cir. 1968).....	86
Shaffner v. Commonwealth, 72 Pa. S.Ct. 63.....	55
Schaffer v. United States,362 U.S. 511,523,80 S.Ct. 945, 952 (1960).....	82
Schoeneman v. United States 115 App. D.C.110,317 F.2d 173,177 (1963).....	63
Sgro v. United States 287 U.S. 206, 53 S.Ct. 138, 77.....	63
Simmons v. United States 390 U.S. 377.....	60
State v. Atkinson, 285 SW 2d 563 (1965).....	45
State v. Tella,321 A 2d 87 6/12/74.....	62
Wiley v. State , 324 SW 2d 862 (1959).....	45
Wong Sun v. United States,371 U.S. 471 (1963).....	60
United States v. Abrams, 29 FRD 178 (S.D.N.Y. 1961).....	80
United States v. Agueci, 310 F.2d 817,99ALR 2d 478 (1962)...	75
United States v. Bradwell, F2d 619 (2nd Cir. 1968).....	46
United States v. Bozza, 916 F.2d 103(2nd Cir. 1969).....	41
United States v. Byrd, 352 F.2d570 (2nd Cir. 1965).....	50
United States v. Borelli, 336 F.2d 376 (2nd Cir. 1964).....	78,85
United States v. Bronker, 395, F.2d 881 (2nd Cir. 1968).....	82
United States v. Butler, 494 F.2d 1246 (10th Cir. 1974).....	78,81

Page

United States v. Capra, 501 F.2d 267 (2nd Cir. 1974)..... 78

United States v. Cross, 329 F.2d 180 (4th Cir 1964)..... 78

United States v. DeNoia, 451 F.2d 929 (2nd Cir. 1971)..... 78

United States v. Deaton,381 F.2d 114 (2nd Cir. 1967)..... 41

United States v. DeCicco, 435, F2d 478 (2nd Cir. 1970)..... 54

United States v. Ecviles, 352 F.2d 892, 897 (7th Cir.1965)... 84

United States v. Ellsworth, 481 F.2d 864, (9th Cir. 1973).... 84

United States v. Goldstein,(CA 2d 1948), 168 F.2d 666..... 6

United States v. Guanti, 421 F.2d 792 (2nd Cir. 1970)..... 87

United States v. Johnson , 382 F.2d 280 (2nd Cir. 1967)..... 53

United States v. Kaplan, 416 F.2d 103 (2nd Cir. 1969)..... 41

United States v. Kellerman, 431 F. 2d 319 (2nd Cir. 1970)..... 87

United States v. Lee and Vaught,485 F.2d 320 (4th Cir. 1974).. 41

United States v. Magnati, 51 FRD 3(D.C. Conn. 1970)..... 83

United States v. Marrapese, 486 F.2d 918 (2nd Cir. 1973)..... 59

United States v. Martinez,486 F.2d 15 (5th Cir. 1973)..... 84

United States v. Ontega,471 F.2d 1360 (1973)..... 83,84

United States v. Pacelli, 491 F.2d 1108 (2nd Cir. 1974)..... 64

United States v. Ramirez, 279 F.2d 712,715 (2nd Cir. 1960).... 63

United States v. Robinson,311 F.Supp. 1063 (1969--Mo)..... 65

United States v. Robinson,(DDC 1947), 71 F.Supp.9,10,11..... 6,23

United States v. Ross, 321 F.2d 61,67 (2nd Cir. 1963)..... 51

United States v. Smith, 283 F.2d 760 (2nd Cir. 1960)..... 53

United States v. Spica , 413,F.2d 129 (8th Cir. 1969)..... 47

United States v. Valenti,(CCA 2nd) 134 F.2d 362,cert. den. (1943), 319,U.S. 761..... 6

	Page
United States v. Varelli, 407, F.2d 735 (7th Cir. 1969).....	78
Yick Wo v. Hopkins, 118 U.S. 356.....	65
Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968).....]	88

Constitutional Provisions

United States Constitution	
Fourth Amendment.....	60,38,59
Fifth Amendment.....	68,64,38,59
Sixth Amendment.....	5,38,60,64,67,68
Ninth Amendment.....	5,38,60,64,59
Fourteenth Amendment.....	38

Statutes

18 U.S.C. 241.....	2,64,65
1503.....	2
844 (h) (1).....	2
Federal Rules of Criminal Procedure,	
Rule 29 (a).....	3,5,64
Rule 29 (b).....	3,5,64
Rule 29 (c).....	3,5,64
Rule 33.....	3,5,
Rule 52 (b).....	61
Rule 14	83

Miscellaneous

11 Duquesne L. Rev. 179.....	61
McCormack, Evidence, Section 190.....	48
McCormank, Evidence, 257-259.....	84
38 U. of Cincinnati L. Rev. 691.....	61
8 Wigmore on Evidence 410 S.2268.....	84
8 Wigmore on Evidence 406 S.2262.....	84

QUESTION PRESENTED

I. THE TRIAL COURT'S ERROR IN DENYING APPELLANT ZINNI'S MOTION(A) FOR JUDGMENT OF ACQUITAL DUE TO THE INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN A CONVICTION(1) AT THE CONCLUSION OF THE GOVERNMENT'S CASE AND (2) AT THE CONCLUSION OF ALL THE EVIDENCE AND (3) FOLLOWING CONVICTION TO SET ASIDE THE VERDICT AND ENTER JUDGMENT OF ACQUITAL AND (B) FOR A NEW TRIAL, PURSUANT TO RULES 29 (a),(b),(c) AND 33, RESPECTIVELY , OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, DEPRIVED THE APPELLANT OF HIS GUARANTEES PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II. THE TRIAL COURT'S RULING,ADMITTING INTO EVIDENCE CERTAIN TAPE RECORDINGS AND THEIR CONTENTS AND WRITTEN TRANSCRIPTIONS THEREOF, DEPRIVED THE APPELLANT ZINNI OF HIS GUARANTEES PURSUANT TO THE FOURTH, FIFTH, SIXTH,NINTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

III. THE TRIAL COURT'S RULING DENYING CO-DEFENDANT DAVID GUILLETTE'S PRETRIAL MOTION TO SUPPRESS DEPRIVED THE APPELLANT ZINNI OF HIS CONSTITUTIONAL GUARANTEES PURSUANT TO THE FOURTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

IV. THE TRIAL COURT'S ERROR IN DENYING APPELLANT'S MOTION TO DISMISS COUNT I OF THE INDICTMENT FOR LACK OF JURISDICTION DEPRIVED THE APPELLANT OF HIS GUARANTEES PURSUANT TO THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

V. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION (A) TO DISMISS THE INDICTMENT ON THE GROUND THAT APPELLANT WAS INDICTED BY A BIASED GRAND JURY AND (B) TO CONDUCT A VOIR DIRE EXAMINATION OF EACH GRAND JUROR AS TO ANY BIAS OR PREJUDICE AGAINST THE APPELLANT AND HIS CO-DEFENDANTS

VI. THE TRIAL COURT'S RULING HOLDING INADMISSIBLE A HEARSAY DECLARATION BY ANTHONY SOUCA THAT HE KILLED DANIEL LAPOLLA DENIED APPELLANT ZINNI A FAIR TRIAL GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

VII. THE TRIAL COURT'S DENIAL OF APPELLANT ZINNI'S MOTION FOR SEVERANCE UNDER RULE 14 SO PREJUDICED THE TRIAL THAT IT DENIED THE APPELLANT A FAIR TRIAL GUARANTEED UNDER THE FIFTH AND SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

VIII. THE TRIAL COURT'S ANSWER AND SUPPLEMENTAL CHARGE TO THE JURY IN RESPONSE TO THE JUNE 12, 1974 JURY QUESTION ON WITHDRAWAL, SO PREJUDICED, CONFUSED AND TAINTED THE JURY'S DELIBERATION THAT IT WAS A DENIAL OF THE DUE PROCESS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT OF CASE

On June 14, 1973, the Federal Grand Jury sitting at Hartford, Connecticut returned an indictment against Robert Joost, David Guillette, William Marrapese and Nicholas Zinni charging each in three counts thereof with violations of 18 U.S.C. Sections 241,1503, and 844 (h) (1). (R. Vol. XIII Doc. 13) (A. 8).

The Court granted motions for severance. Defendants Joost and Guillette were convicted by Jury before the Honorable T. Emmett Clairie, at Hartford in January 1974. And appellant Zinni and co-defendant Marrapese were convicted by Jury on June 12, 1974, before the Honorable Thomas F. Murphy, at Waterbury, Connecticut. A timely Motion For New Trial was denied by the Court on June 26, 1974, and appellant Zinni and co-defendant Marrapese were each then sentenced by the Court to life imprisonment on Count 1, 5 years on Count 2, and 10 years on Count 3, all to run concurrently. A Motion for a New Trial based upon (1) Newly Discovered Evidence and (2) Prosecutorial Suppression of Material Evidence was subsequently filed by each defendant. On September 5 and 6, 1974, hearing was held on said motion, and on October 19, 1974, the Court denied the motion. Timely notices of appeal have been filed by appellant Zinni (A) from the verdict, judgment and sentencing, from the Court's denial of the Motion For a New Trial on the ground that the verdict was against the weight of the evidence, and in the interest of justice (C.A. No. 74-1941). and (B) from the Court's denial of the Motion For a New Trial based upon (1) newly discovered evidence, and (2) prosecutorial suppression of material evidence. (C.A. No. 74-2649)

STATEMENT OF FACTS

A detailed analysis of both the Government and Defense case is set forth in "Question Presented Number One and Argument Thereon", pertaining to the Court's denial of defense motions for judgment of acquittal, to set aside the verdict, and for a new trial based upon the insufficiency of the evidence, and that the verdict was against the weight thereof, pursuant to Rules 29 (a) (b) (c) and Rule 33 of the Federal Rules of Criminal Procedure.

Briefly, the Government's case consists of three parts:

(1) The playing for the jury, while they read along from a transcription thereof, of a highly prejudicial and inflammatory tape recorded conversation, which occurred on March 31, 1972, between Daniel LaPolla, who had been secretly wired by A.T.F. Agents, and allegedly appellant Zinni, co-defendant Marrapese and certain other persons, wherein co-defendant Marrapese allegedly declared an intention to dynamite the Brooklyn, Connecticut Jail. This was offered by the Government as "prior act or offense" evidence, and over defense objection, admitted into evidence by the Trial Court. (See Argument II).

(2) Testimony of the principal Government witness, John Anthony Housand, to his alleged association with the named defendants between April and June 1972, including his presence at an alleged 15 minute 'conspiratorial' meeting commencing at approximately 10:00 a.m. at Carter's Jewelry Store, Cranston, Rhode Island, wherein he was allegedly hired by the named defendants to shoot Daniel LaPolla for the sum of $5,000.00.

(3) Testimony from various witnesses concerning attempts between May and September 1972 to locate Daniel LaPolla by co-defendants Joost, Guillette, and Marrapese, his attorneys, Andrew Bucci and John O'Neill, and a private

investigator, Robert Joyal, hired to do so by Attorney Andrew Bucci.

Briefly, the defense case consisted of several parts:

(1) Cross-examination of the Government's principal witness, John Anthony Housand, to illustrate:

(a) his lack of integrity and credibility, as indicated by his lengthy criminal record of offenses relating directly to fraud and misrepresentation such as, forgery and larceny, coupled with his admissions of earning his livelihood for many years by the use of numerous aliases, and by fabrication--by the "guarantee of the conviction" of the four defendants--and misrepresentation, both orally and by forged documents.

(b) his motive to fabricate, as indicated by numerous promises made to him by the Government including monies and to appear on his behalf before the Parole Board at a time when he had spent the better part of eight years in prison for various offenses and had just been sentenced to an additional six year term.

(c) The numerous inconsistencies existing between his trial testimony in June 1974, and that of his testimony at prior proceedings, and his written statements, and the testimony of other defense witnesses.

(2) Testimony of anumber of the most credible defense witnesses, together with certain documentary exhibits, to prove conclusively that Mr. Housand's bizarre story of a 'conspiratorial' meeting having occurred around 10:00 a.m. on Monday morning, May 8, 1972, at Carter's Jewelry Store, Cranston, Rhode Island was absolutely false, since Attorney Andrew Bucci, appellant Zinni and co-defendant Marrapese were in the Providence Superior Courthouse from

shortly before 10:00 a.m. to noontime on May 8, 1972. These witnesses included Superior Court Judge John S. McKiernan (former Lieutenant Governor of Rhode Island for ten years), a Rhode Island Senator, five lawyers, the stenographic court reporter, two police officers, one being Detective Fuina, the investigating officer in the Providence Superior Court case, and "Police Officer of the Year" in 1972. The evidence revealed that the alleged locale of the supposed meeting, Carter's Jewelry Store, was no longer in business on May 8, 1972.

(3) By showing that appellant Zinni had almost total non-participation in any of the activities that the Government claims were part of the conspiracy.

ARGUMENT

I. THE TRIAL COURT'S ERROR IN DENYING APPELLANT ZINNI'S MOTIONS (A) FOR JUDGMENT OF ACQUITTAL DUE TO THE INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN A CONVICTION, (1) AT THE CONCLUSION OF THE GOVERNMENT'S CASE, AND (2) AT THE CONCLUSION OF ALL OF THE EVIDENCE, AND (3) FOLLOWING CONVICTION TO SET ASIDE THE VERDICT AND ENTER JUDGMENT OF ACQUITTAL AND (B) FOR A NEW TRIAL, PURSUANT TO RULES 29 (a), (b), (c), AND 33, RESPECTIVELY, OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, DEPRIVED THE APPELLANT OF HIS GUARANTEES PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Trial Court denied appellant Zinni's Motion For Judgment of Acquittal due to the insufficiency of the evidence presented by the Government to sustain a conviction pursuant to Rule 29 (a), (Tr. 917); 29 (b) (Tr. 1431) 29 (c) and 33 (Tr. 1749) of the F.R. Crim. Proc.

Appellant Zinni respectfully contends that a comparison of (1) the 'Facts Presented' by the Government at trial with (2) the 'Elements of Each

Offense' as set forth in each of the three counts of the indictment, indicates a complete insufficiency of evidence presented to sustain a conviction of such offenses.

Concededly, the scope of judicial review of the sufficiency of the evidence in criminal cases utilized within the Court of Appeals for the Second Circuit, viz., the so-called "Second Circuit Rule," as crystallized in the opinion of Judge Clark in United States v. Valenti, (CCA 2d) 134 F2d 362, 364, cert. den., (1943) 319 U.S. 761 is that the standard of proof beyond a reasonable doubt is not incorporated into the legal test.

However, where, following the Court's denial of the defendant's Motion for Judgment of Acquital at the conclusion of the Prosecution's case-in chief, the defense goes forward with it's own evidence, the Court will consider all of the evidence when ruling on a second defense motion for Judgment of Acquital at the conclusion of all of the evidence. For, in determining the sufficiency of the evidence at the close of the trial, subsequent to the verdict, or on appeal, the Trial or Appellate Court, as the case may be, looks to the entire record and not simply to the evidence offered by the Government on its direct case. United States v. Goldstein, (CA 2d, 1948) 168 F 2d 666. And, while a motion for acquital requires the Court to take the evidence in a "light most favorable to the Government," a motion to set aside the verdict as against the weight of the evidence allows the Court to consider the credibility of Government witnesses. As Judge Holtzoff stated in United States v. Robinson, (DDC 1947) 71 F. Supp. 9, 10-11:

> "On a motion for a new trial on the ground that the verdict is against the weight of the evidence, the power of the Court is much broader. On such an application, the Court may weigh the evidence and consider the credibility of witnesses. If the Court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted...."

And, an Appellate Court may remand for a new trial, after reversing a conviction for the insufficiency of the evidence, predicated on 28 U.S.C. Section 2106. (See Bryan v. United States, (1950) 338 U.S. 552,70 S. Ct. 317)

Count I of the indictment, (R.Vol.XIII, 13) (A. 8), in brief, alleges that from on or about May 4, 1972 until September 29, 1972, IN THE DISTRICT OF CONNECTICUT AND ELSEWHERE, the defendants Guillette, Joost, Zinni and Marrapese engaged in a conspiracy to injure and intimidate Daniel LaPolla and further that this CONSPIRACY RESULTED IN THE DEATH OF DANIEL LAPOLLA. (Emphasis added by appellant Zinni).

Obviously, Count I encompasses any acts occurring either within or without the District of Connecticut. The Government's case against the appellant Zinni is totally lacking in any evidence as to conduct by the appellant Zinni engaging in activity to conspire to injure and intimidate Daniel LaPolla and further, that these acts resulted in the death of Daniel LaPolla in the District of Connecticut. As to without the District of Connecticut, the Government's case at its best is the placing of the appellant Zinni at a meeting of 4 or 5 other people on May 8, 1972, where he said "It's ok with me", and the testimony by one whose credibility left much to be desired vis a vis the questions posed by the jury during their deliberation.

Certainly, assuming arguendo, there was an act done by the appellant Zinni "elsewhere" resulting in Daniel LaPolla's death that conspiracy would

have terminated on the departure of Mr. Housand from Rhode Island on June 13, 1972. There was no evidence against the appellant Zinni in the case, and the Government failed to show even one act done by him in the District of Connecticut.

However, Count II of the indictment specifically limits the probative acts to those "IN THE DISTRICT OF CONNECTICUT". Count II alleges briefly, that on or about September 29, 1972, "IN THE DISTRICT OF CONNECTICUT" defendants Guillette, Joost, Marrapese and Zinni unlawfully endeavored, BY FORCE AND VIOLENCE, to influence, intimidate and impede Daniel LaPolla (Emphasis added by appellant Zinni). In the light of the meticulous preciseness with which the Government's entire case has been prepared and presented from the outset, one can only conclude that such a restrictive limitation on Count II to those probative acts, performed "IN THE DISTRICT OF CONNECTICUT" , without the added wording " AND ELSEWHERE" as included within Count I, was an intentional part of the pleading of Count II. There was not even a scintilla of evidence that the appellant Zinni in anyway within or without the District of Connecticut endeavored to obstruct justice BY FORCE AND VIOLENCE. (Emphasis added by appellant Zinni).

In fact, Count III of the indictment exhibits even greater specificity in restricting the act set forth. Count III alleges, in brief, that on September 29, 1972, "IN ONECO, CONNECTICUT IN THE DISTRICT OF CONNECTICUT" defendants Guillette, Joost, Marrapese and Zinni " DID UNLAWFULLY USE AN EXPLOSIVE", i.e., a dynamite bomb to injure and intimidate Daniel LaPolla, a witness in a Court of the United States. (Emphasis added by appellant Zinni). This further narrowing and restricting of the allegations is obviously an intentional and conscious part of the pleading.

Summary of Facts Presented (1) in the Light Most Favorable to the Government Without a Consideration of Any Contradictory Facts Presented by the Defense and (2) Assuming Said Facts to be True, Arguendo, Without Contesting the Credibility of Any Prosecution Witness Including John A. Housand (Appellant,however, Takes Great Issue with Mr. Housand's Credibility and Version of said Events).

(1) Government Agents rigged Daniel LaPolla, a Government informant, with a sound recording device resulting in a recordation of a conversation on March 30, 1972, allegedly between appellant Zinni, co-defendant Marrapese, and Daniel LaPolla concerning (a) the theft of M-16 rifles from the Westerly, Rhode Island Armory and (b) statements allegedly by co-defendant Marrapese concerning the dynamiting of the Brooklyn Jail, Brooklyn, Connecticut . [The Government offered this under the theory of so-called "prior act or offense" as against co-defendant Marrapese, rather than as a mere boast, or threat or declaration of intention. (See Issue Presented Number Two and Argument Thereon).].

(2) Defendants Guillette, Joost, Marrapese and Zinni were indicted in the United States District Court for the District of Connecticut for the theft of these M-16 rifles and arraigned thereon on May 4, 1972. Over defense objection (Tr.5), this indictment naming Daniel LaPolla, but not as a co-defendant, was read in its entirety to the jury by the prosecution (T.Tr. 6-11) (A. 27).

(3) The principal prosecution witness, John Anthony Housand, testified that he has been at Guillette's home and has conducted various electrical experiments with Guillette in the basement, and is aware that Guillette has skills in this field (T. Tr. 297); that on May 4, 1972, following the defendant's arraignment at the United States Courthouse,Hartford Connecticut, on the

indictment involving the theft of the thirty M-16 automatic rifles, (Tr. 319) he drove a vehicle containing several persons, including defendants Joost and Guillette, from Hartford to Providence (Tr. 324) and that enroute these two defendants allegedly asked him if he would kill Daniel LaPolla for $5,000.00, to which he agreed (Tr. 328,329); that on May 8, 1972, at a meeting at Carter's Jewelry Store in Providence, Rhode Island, with defendants Guillette, Joost, Marrapese and Zinni, and an attorney Andrew Bucci present, he was allegedly asked if he would shoot Daniel LaPolla for $5,000.00 to which he allegedly agreed (Tr. 342); that thereafter he had a 'falling-out' with the defendants, and on June 13, 1972, left the State of Rhode Island without ever having attempted to shoot Daniel LaPolla (Tr. 336); that he was rearrested in Fayetteville, Arkansas on July 15, 1972 (Tr. 361), for an unrelated offense, then transferred to another prison in North Carolina, and remained in custody until April 1974, when he was paroled (Tr. 360).

(4) In May 1972 co-defendant Marrapese and one George Hennebury went in co-defendant Marrapese's vehicle to the local post office at Oneco, Connecticut attempting to locate Daniel LaPolla since Mr. LaPolla had some jewelry belonging to co-defendant Marrapese (Tr. 569-570) (A. 28). After identifying himself to the post office employee, co-defendant Marrapese was given an address. They went to the house and knocked but no one answered (Tr. 571). They also inquired at a nearby gas station, co-defendant Marrapese identifying himself by a card with his name on it (Tr.591) (A.), but did not learn the whereabouts of Mr. LaPolla (Tr. 592).

(5) On July 29, 1972, co-defendant Marrapese had a conversation in Providence with Mrs. Ann Kiley, a sister of Daniel LaPolla wherein he requested

the whereabouts of Daniel LaPolla, to which she replied that she did not know, and to which he allegedly responded that he intended to subpoena her, and her brother, who was a Catholic priest, the Reverend LaPolla, and her sister Nancy, a Catholic nun, to testify as defense witnesses for the co-defendant Marrapese at his forthcoming trial for the theft of the M-16 rifles (Tr. 630-650).

(6) (Testimony of Defense witness, Attorney Andrew Bucci)--During the summer of 1972, Attorney Andrew Bucci and co-defendant Marrapese drove in co-defendant Marrapese's vehicle into the Oneco, Connecticut area in the vicinity of Daniel LaPolla's house trying to locate Mr. LaPolla.(Tr.1258) They questioned certain local residents in this regard including a family operating a nearby gas station (Tr. 1259). They went to Mr. LaPolla's house and knocked but received no answer (Tr. 1261). They also went to a local stone quarry wherein the stolen M-16 rifles had allegedly been stored by LaPolla prior to the recovery of these rifles by Federal Agents (Tr. 1260). Shortly thereafter, Attorney Bucci hired a Mr. Robert Joyal, a private investigator in order to attempt to locate Mr. LaPolla (Tr. 1263).

(7) (Testimony of Defense witness Robert Joyal)-- As a private investigator retained by Attorney Andrew Bucci, he conducted a surveillance while seated in his vehicle in the vicinity of Daniel LaPolla's house for several hours each day for nine successive days, from July 29th through August 6, 1972, (Tr.929-944). Although he varied the hours in order to include both day and night surveillance (Tr. 936) he was unsuccessful in observing Mr. LaPolla. (Tr. 944). His instrucions, as given to him by Attorney Bucci, were that if h observed Mr. LaPolla, he was to tell Mr. LaPolla to contact Attorney Bucci (Tr. 956) (A. 28), and further, that if this witness, Mr. Joyal, was approached by any State or Federal law en-

forcement officers while he was in the area, he was to identify himself and advise them of his exact purpose in the area. (Tr. 957) (A. 29).

(8) At the end of July 1972 co-defendant Marrapese identified himself (Tr. 605) to a Mr. Alfred Marafino, the present husband of Daniel LaPolla's ex-wife, Helen, seeking to locate Daniel LaPolla. (Tr. 602,603) Mr. Marafino told him that they didn't want to get involved (Tr. 605), co-defendant Marrapese allegedly stated that he could make it hard for Mrs. Marafino and her son in the seminary (Tr. 604). They were interviewed shortly thereafter at a law office by Mr. Bucci's law associate, Attorney John O'Neill and another attorney in this regard, and they gave some information concerning Daniel LaPolla (Tr. 607).

(9) On September 7, 1972, Federal Agents observed a vehicle which was registered to the wife of co-defendant Marrapese, in the Oneco, Connecticut area where Daniel LaPolla lived (Tr. 655). The vehicle, containing an unidentified white male, drove off at a high rate of speed and was not overtaken by the Agents (Tr. 667,668) . Daniel LaPolla was then, and had been for some time in Federal Protective Custody in various locations outside of Connecticut . (Tr. 147).

(10) On September 22 and 23, 1972, defendants Joost and Guillette, using their own names, rented a private airplane and a pilot from whom Guillette had taken flying lessons (Tr. 821), and told the pilot that they were looking for an individual in the Oneco, Connecticut area in order to serve him with some legal papers. (Tr. 793). While the pilot flew over Daniel LaPolla's home in Oneco, Connecticut, defendant Guillette in the airplane

communicated through a walkie-talkie radio with defendant Joost on the ground. (Tr. 797) On September 22nd they did not see nor make any contact with LaPolla. On September 23rd, Guillette was informed by Joost through the walkie-talkie that Daniel LaPolla had returned to his home, looked at Joost from some distance and then left the area (Tr. 815). Neither Joost nor Guillette made any contact with Mr. LaPolla. Within the week following Daniel LaPolla's death on September 29, 1972, Guillette telephoned one of the pilots, asked him if he had read about the incident in Oneco, Connecticut the previous week, and requested of the pilot, that if he was asked about the flight, not to mention it (Tr. 818-819).

(11) (Testimony of Prosecution witnesses, and also Defense witnesses, Attorney Andrew Bucci, and Edith Marrapese, co-defendant Marrapese's mother,)--On September 25, 1972, following the death from natural causes of the previously mentioned Reverend LaPolla, a wake was held at a church in Providence. (Tr. 153) This wake was attended by a number of persons including co-defendant Marrapese's grandmother, mother and aunt who are distantly related to Daniel LaPolla. (Tr. 920-921) (A.29,30). On this evening of September 25, 1972, at a time when co-defendant's grandmother, mother and aunt were inside attending the wake (Tr. 920) (A. 29), co-defendant Marrapese and Attorney Bucci attempted to enter where the wake was being held, in order to look for and interview Daniel LaPolla (Tr. 1265-1266) (A.34). Several Federal Agents were on duty stationed at the wake, and co-defendant Marrapese was refused admittance (Tr. 159). After some discussion, Attorney Bucci, however, was eventually allowed to enter, but did not see Mr. LaPolla in attendance, so he left. (Tr. 1266).

(12) The following day, co-defendant Marrapese and Attorney John O'Neill a law associate of Andrew Bucci, entered the church to observe Reverend LaPolla lying in state. (Tr. 640). They both signed their true names on the guest register at the church (Tr. 640) (A. 31). The following morning Joost and Guillette were observed at the cemetery in close proximity to the gravesite burial services.

(13) (Testimony of Defense witness, Mrs. Michaela Valetta)--On September 27, 1972, co-defendant Marrapese and attorney, John O'Neill, and a law office secretary, Mrs. Michaela Valletta, went into the Oneco, Connecticut area to look for and interview Daniel LaPolla. (Tr. 970) They identified themselves, Mr. O'Neill leaving his attorney's business card while having a conversation with the family who operated the gas station very near Mr. LaPolla's house (Tr. 975) (A. 31). They were unable to obtain any information concerning Mr. LaPolla's possible whereabouts from these persons. (Tr. 977) They then went to the local stone quarry, again identified themselves to several persons there and stating their purpose to locate Mr. LaPolla, but again received no information in this regard. (Tr. 977-979). They then went to the local newspaper office to look at articles pertaining to the theft of the M-16 rifles (Tr. 980), and then to a bicycle shop where co-defendant Marrapese purchased a bicycle for his 12 year old daughter's birthday on that date (Tr. 983-984) (A. 31,), and finally they returned to the Rhode Island area following this unsuccessful attempt to locate and interview Daniel LaPolla. (Tr. 984).

(14) On the early afternoon of September 29, 1972, Daniel LaPolla was killed by an exploding dynamite bomb when he returned in his vehicle to his

house in Oneco, Connecticut and attempted to enter the location.

(15) On Friday evening, September 29, 1972, at approximately 6:00 p.m. one George Hennebury went to co-defendant Marrapese's house (T.Tr. 572), and at approximately 8:00 p.m. he and co-defendant Marrapese went to the Colonial Hilton Motel, a large complex in Providence (T.Tr. 594) which he and co-defendant Marrapese frequented practically every Friday evening (T.Tr.595). He registered for a room under his own name. (T.Tr.596) Later he was joined in the cocktail lounge by co-defendant Marrapese and then by Attorneys Andrew Bucci and Raymond Coia. (T.Tr. 575) It was decided that co-defendant Marrapese stay at the motel that evening in Mr. Hennebury's room until Attorney Andrew Bucci could determine why Federal Agents were parked around co-defendant Marrapese's house. (T.Tr. 578) The following evening Mr. Hennebury was again at the Colonial Hilton cocktail lounge with co-defendant Marrapese and defendants Joost and Guillette. (T.Tr.600).

Appellant Zinni respectfully contends that by an analytical comparison of the foregoing facts to each element alleged in each count of the indictment the insufficiency of the Government's proof becomes immediately obviuos. WHAT OCCURRED DURING APPELLANT ZINNI'S TRIAL SOULD BE CHARACTERIZED AS A "SHOT-GUN" METHOD OF PROOF , WHEREBY A NUMBER OF INNOCENT,INNOCUOUS OR EQUIVOCAL ACTS OF OTHER PEOPLE AND CO-DEFENDANTS ARE LUMPED TOGETHER, AND THEN COMBINED WITH THE HIGHLY PREJUDICIAL AND INFLAMMATORY EVIDENCE OF THE TAPE RECORDED CONVERSATION BY CO-DEFENDANT MARRAPESE CONCERNING THE BOMBING OF THE BROOKLYN, CONNECTICUT JAIL, A TAPE RECORDED CONVERSATION OF A CO-DEFENDANT WITH WHICH APPELLANT ZINNI HAD LITTLE OR NOTHING TO DO, AND CONVICTION THEREBY RESULTS! But, by breaking down each count of the indictment into its component parts, and then searching the record for proven facts applicable to each element alleged, the insufficiency of proof can easily be demonstrated.

Appellant Zinni would respectfully suggest that the two basic elements necessitating proof in Count I are (1) that a conspiracy existed and (2) that such conspiracy 'RESULTED IN THE DEATH OF DANIEL LAPOLLA.' Appellant Zinni would further respectfully suggest that unless there is sufficient proof of Count III, that is, the 'USE OF DYNAMITE IN ONECO, CONNECTICUT ON SEPTEMBER 29, 1972' BY THE NAMED DEFENDANTS that there is no proof that any such conspiracy RESULTED IN THE DEATH OF DANIEL LAPOLLA as alleged in Count I. The same logical reasoning applies to Count II which requires sufficient proof that the named defendants ' IN THE DISTRICT OF CONNECTICUT ON SEPTEMBER 29, 1972' unlawfully endeavored 'BY FORCE AND VIOLENCE' to influence, intimidate and impede Daniel LaPolla. Obviously, this "use of force and violence" refers to the same subject matter as the allegation in Count III, "did unlawfully USE AN EXPLOSIVE, i.e. A DYNAMITE BOMB" to intimidate a witness, Daniel LaPolla. Thus, by logical reasoning, unless there is sufficient proof to convict as to Counts II and III, there is not sufficient proof of the 'proximate causation' allegation in Count I viz, that such conspiracy " RESULTED IN THE DEATH OF DANIEL LAPOLLA." A comparison of the proven facts with the Counts of the indictment in their reverse order might be suggested to better illustrate the Government's failure of proof in this case.

Count III

Appellant Zinni most strongly contends that there is not one shred of evidentiary proof in this case that the defendant Zinni:

(1) On September 29, 1972, USED AN EXPLOSIVE, i.e. A DYNAMITE BOMB IN Oneco, Connecticut.

(2) nor, for that matter, that the defendant Zinni was EVEN IN ONECO, CONNECTICUT ON SEPTEMBER 29, 1972, the day of the explosion; or for

that matter at any time between May 1972 and September 29, 1972.

Count II

Again, Appellant Zinni most strongly contends that there is absolutely no proof that the defendant Zinni:

(1) endeavored "BY FORCE AND VIOLENCE" to intimidate Daniel LaPolla IN THE DISTRICT OF CONNECTICUT ON SEPTEMBER 29, 1972, or at any time or at any other place.

(2) nor that the defendant Zinni was EVEN IN THE DISTRICT OF CONNECTICUT ON SEPTEMBER 29, 1972, the day of the explosion, or at any other time between May 1972 and September 29, 1972.

By limiting the probative acts to those performed WITHIN CONNECTICUT the Government obviously concedes that it does not consider as acts of "INTIMIDATION" those acts performed OUTSIDE the District of Connecticut. This includes those acts performed within the State of Rhode Island, such as co-defendant Marrapese's conversations with Mrs. Kiley, the sister of Daniel LaPolla, and Mr. Marafino, each of which conversations related to an attempt to locate the whereabouts of Daniel LaPolla in order to interview him prepatory to trial, and in Mrs. Kiley's case, co-defendant Marrapese's stated intention to subpoena Mrs. Kiley, her brother the Reverend LaPolla, and her sister the Catholic nun as defense witnesses for co-defendant Marrapese at his forthcoming trial for the theft of the M-16 rifles. Other acts which are not considered "acts of intimidation" by the Government, since they also occurred outside the District of Connecticut and within Rhode Island, include the visits of the named defendants and Attorney Andrew Bucci and his law associate, Attorney John O'Neill to the wake, and church, where Father LaPolla lie in state, in order to locate and interview Daniel LaPolla, and wherein Attorney O'Neill and co-defendant Marrapese both signed their true names in the church

guest register. In any event, not one of the above acts (1) occurred on September 29, 1972, (2) or within the District of Connecticut (3) nor was there any "force or violence" associated with such acts, (4) nor was there any "impeding" of Daniel LaPolla since they never made contact nor even saw Mr. LaPolla at any time.

The only acts which occurred within the District of Connecticut were (1) the airplane flights of Joost and Guillette, and (2) the visits into the Oneco, Connecticut area by co-defendant Marrapese, Mr. Hennebury, Private Investigator Robert Joyal, Attorneys Andrew Bucci and John O'Neill and their legal secretary. And as to all of the above (1) none of the above occurred on September 29, 1972, (2) there is no evidence of any "force or violence" associated with any of the above, (3) there was no "intimidation" or "influencing" of Daniel LaPolla, nor was there in fact, any contact with him at all, except for the brief glimpse at a distance by Joost on this one occasion where Mr. LaPolla allegedly returned near his home and then immediately left the area again. On each of the occasions that co-defendant Marrapese went into the Oneco area he drove his own vehicle, and he and his attorneys identified themselves by their true names, the attorneys leaving their business cards, and stating to each person they questioned in this tiny community of 40-50 persons their request for information concerning the present whereabouts of Daniel LaPolla. The last of such visits into the Oneco, Connecticut area in the immediate vicinity of Daniel LaPolla's home was ON SEPTEMBER 27, 1972, ONLY TWO DAYS BEFORE MR. LAPOLLA'S DEATH. On this occasion co-defendant Marrapese's conduct in (1) accompanying himself with Attorney O'Neill and the legal secretary, (2) identifying himself by true name and allowing the attorney to leave his business card, (3) interviewing face to face the inhabitants of this tiny community, (4) revealing his purpose to locate and

interview Daniel LaPolla, (5) driving his own Cadillac automobile bearing license plates registered to him, and (6) after questioning persons at a gas station very near Mr. LaPolla's house, and at the quarry, then proceeding to the local newspaper office, and finally, (7) purchasing in his own name a bicycle for his 12 year old daughter's birthday, is manifestly completely inconsistent with the conduct of a potential killer surreptitiously stalking his prey! It is respectfully suggested that it is only good common sense that if a person knew either that a bomb was going to be placed in Mr. LaPolla's house only 2 days later on September 29, 1972, or for that matter, may have already been placed at the house as of this date, September 27, 1972, the very last place that person would want to be seen would be in the neighborhood where the house is located, for the explosion might possibly have occurred on September 27, 1972, while Mr. Marrapese was in the immediate area! A person with any common sense at all would be miles away, in Hawaii perhaps, passing out $100.00 bills as tips to bellhops so that they would remember him , as a possible alibi.

In short, there are no facts to support a conviction as to Counts II and III of the indictment , and since this is so, then the allegation of 'proximate causation' as set forth in Count I fails, there being no evidence that if any such conspiracy did exist that it " RESULTED IN THE DEATH OF DANIEL LAPOLLA."

Count I

The element required to be proven by the Government was (1) that the named defendants engaged in a conspiracy to deprive Daniel LaPolla of his civil rights and (2) that such conspiracy RESULTED IN THE DEATH OF DANIEL LAPOLLA.

It is strongly contended by the appellant Zinni that the only conspiracy in any way arguably proven by the Government was that which allegedly occurred on May 8, 1972, at the so-called meeting at Carter's Jewelry Store at which the named defendants and Attorney Andrew Bucci were present and wherein John Anthony Housand was allegedly hired to shoot Daniel LaPolla for the sum $5,000.00. [Appellant Zinni takes great issue with the credibility of John A. Housand who admitted in his testimony that lying was his common practice for years while he engaged in misrepresentations, forgeries, and 'con-man' activities (T.Tr. 550), and strongly contends that the contradictory testimony by a Superior Court Judge (the former Lieutenant Governor of the State of Rhode Island), a State Senator, an Assistant Attorney General, five attorneys and two police officers conclusively proved that no such meeting on May 8, 1972, ever did occur]. However, for the purpose of this argument, assuming the testimony of John A. Housand to be true, and considering such evidence 'in the light most favorable to the Government,' there was only one conspiracy proven by the Government, and this was the conspiracy wherein on May 8, 1972, John Housand agreed to shoot Daniel LaPolla for $5,000.00. But this specific conspiracy never "resulted in the death of Daniel LaPolla." Mr. Housand left Rhode Island on June 13, 1972, without ever having attempted to shoot Mr. LaPolla. This conspiracy, therefore, if it ever existed at all, terminated at the latest on June 13, 1972. And on July 15, 1972, Mr. Housand was taken into custody in Arkansas and remained in continuous custody until January 1974, and Mr. LaPolla was killed in the interim on September 29, 1972. The conspiracy to hire Housand to shoot Mr. LaPolla certainly, therefore, did not result in the death of Mr. LaPolla. And the Government neither alleged or

offered evidence of any new or subsequent conspiracy being entered into after Mr. Housand left the State of Rhode Island. If the Government is claiming that a new conspiracy to kill LaPolla commenced sometime after Mr. Housand left Rhode Island, it was incumbent upon the Government to allege the particulars surrounding that conspiracy in its Bill of Particulars, and to introduce evidence in support of same, and no such evidence was adduced.

THE GOVERNMENT'S ENTIRE CASE IS BUILT UPON PURE SPECULATION. The prosecution read to the jury the indictment for the theft of the M-16 rifles, as well as the indictment in the instant case which sets forth the allegation in Count I thereof that Mr. LaPolla was deprived of his civil right to testify against the named defendants at the trial for the theft of the M-16 rifles. THUS, THE GOVERNMENT HAS CAUSED THE JURY TO SPECULATE THAT SINCE THESE NAMED DEFENDANTS ALLEGEDLY HAD THE MOTIVE TO KILL DANIEL LAPOLLA IN ORDER TO PREVENT HIM FROM TESTIFYING, THEN THEY MUST HAVE BEEN THE ONES, IN FACT, WHO DID KILL HIM! The prosecuting attorney in his closing argument stated to the jury that (Tr. 1605-1606) (A. 32,33):

> "But when you go into the jury room, you collectively have to try to remember all the facts and the overwhelming consideration which you have before you in the jury room is, first of all, did a man die? Secondly, he died because he was a witness. And third, THERE WERE ONLY FOUR PEOPLE IN THE WORLD WHO HAD A MOTIVE TO PREVENT HIM FROM TESTIFYING. And when you consider that, you will reach the conclusion and be able to analyze all the other little isolated instances which have been shown to you, and you will be able to understand why these particular incidents took place." (Emphasis added by appellant Zinni)

Next, the Government introduced evidence that Guillette allegedly had some skills in the field of electricity, and had installed a home made burglar alarm system in his home. From this they asked the jury to speculate that Guillette was the one who made the dynamite bomb. At appellant Zinni and co-defendant Marrapese's trial, evidence was introduced that three

"identifiable" fingerprints were found on the bomb device. The defense had the prosecution fingerprint expert roll appellant Zinni's and co-defendant Marrapese's fingerprints on sample cards for comparison purposes during the noon recess. Based on a comparison then made, the expert testified that the three "identifiable" fingerprints on the bomb device were not those of either appellant Zinni or co-defendant Marrapese! The prosecuting attorney stated in his argument to the jury that Guillette had the equipment and the skills, and that the prosecution had never stated that Marrapese or Zinni had made the bomb, but rather that they had functioned in a "managerial" capacity (T.Tr. 1610-1611) (A. 33). Thus, the jury is asked to speculate (1) that since Guillette had certain electrical skills he must have made the bomb and (2) that appellant Zinni and co-defendant Marrapese acted in a "managerial" capacity, that is, that when Guillette allegedly made the bomb he did so as the 'agent' of appellant Zinni and co-defendant Marrapese. And from this purely conjectural process, the jury are then asked to speculate that the defendants or one of them must have placed the dynamite bomb at Daniel LaPolla's house and, therefore, "did use an explosive, to wit, a dynamite bomb, on September 29, 1972." [It should be noted that at the hearing of Joost and Guillette's Motion for a New Trial, on October 21, 1974, a Government expert testified that neither Joost's nor Guillette's fingerprints were found on the bomb device (See C.A. 74-2649)].

In order to sell this to the jury, the Government added (1) testimony concerning the various innocent attempts to locate Daniel LaPolla, such as the visits to Oneco, and to the wake of Reverend LaPolla in Providence, (2) the testimony of John A. Housand as to the May 8, 1972, meeting (which was con-

clusively contradicted by a number of most credible defense witnesses) and (3) by the highly prejudicial and inflammatory so-called "prior act or offense" evidence of the tape recorded conversation pertaining to the dynamiting of the Brooklyn, Connecticut Jail. In short, the Government used a "somebody had to have done it and who else had the motive" argument. And this combination of conjecture, speculation, and highly inflammatory, inadmissible evidence resulted in conviction!

Appellant Zinni respectfully contends, therefore, that even by considering the evidence in 'the light most favorable to the Government' the Trial Court erred in denying appellant Zinni's Preverdict and Postverdict Motions for 'Judgment of Acquittal.'

And certainly the Trial Court ruled erroneously in denying appellant Zinni's Motion for a New Trial on the ground that the 'Verdict is Against the Weight of the Evidence.' As stated previously, the Trial Court when considering this motion may weigh the evidence and consider the credibility of witnesses, United States v. Robinson (supra). And other than the highly inflammatory evidence of the tape recording pertaining in part to the statement of an alleged intention to dynamite the Brooklyn, Connecticut Jail by co-defendant Marrapese, which was limited as alleged "prior act or offense" evidence, the entire Government case depended upon the testimony of one witness, John Anthony Housand. Appellant Zinni respectfully, but strongly contends that Mr. Housand's integrity and credibility were satisfactorily impeached (a) by his background of crimes involving dishonesty and misrepresentation, and (b) by promises of benefit, and actual reward by the Government, thus giving him a motive to fabricate, and, (c) by the contradictory testimony

of a number of defense witnesses of the utmost integrity and credibility, and therefore, the Trial Court should have granted the Motion for a New Trial.

The Government's principal witness, John Anthony Housand, was an informant without whose testimony concerning an alleged 'conspiratorial' meeting on May 8, 1972, at Carter's Jewelry Store, Cranston, Rhode Island the Government evidence presented would have fallen. There was no other Government evidence presented directly or indirectly connecting appellant Zinni to Daniel LaPolla, and until Mr. Housand was discovered there was not even sufficient evidence to support an indictment. Appellant Zinni strongly contests the credibility, integrity and truthfulness of Mr. Housand, whose bizarre testimony concerning a May 8, 1972 'conspiratorial' meeting was conclusively contradicted and impeached by a number of defense witnesses including a Superior Court Judge (the former Lieutenant Governor of the State of Rhode Island), an Assistant Attorney General in Rhode Island, a State Senator in Rhode Island, four other Rhode Island attorneys, a Superior Court reporter and an investigating officer who was 'Police Officer of the Year' in Rhode Island in 1972.

An analysis of the testimony given by Mr. Housand on both direct and cross-examination, and of the contradictory defense testimony reveals that the verdict was truly against the weight of the evidence and based for the most part on the highly prejudicial tape recording of co-defendant Marrapese concerning the dynamiting of the Brooklyn Jail! Mr. Housand testified that on Monday, May 8, 1972, at approximately 10:00 a.m. he and co-defendant Guillette arrived at Carter's Jewelry Store, Cranston, Rhode Island, and when they entered Attorney Andrew Bucci of Providence, appellant Zinni and co-defendants Marrapese and Joost were already there! (Tr. 338) (A. 36); that at

this meeting the defendants allegedly hired him to shoot Daniel LaPolla for $5,000.00, and he agreed (T.Tr. 342); that the meeting lasted approximately 15 minutes (T.Tr. 345,414) (A. 37); that he and Guillette then went back to Guillette's house in Providence, where they spent the rest of the day (T.Tr. 421); that this very evening Guillette and Mr. Housand went from Providence to Woonsocket, Rhode Island to a location where one Edward Sitko gave a gun to Mr. Housand in Guillette's presence (T.Tr. 347) (A. 38); that on May10,11, and 12, 1972, Mr. Housand was questioned first by members of the Lincoln, Rhode Island Police Department, and then by F.B.I. agents, initially at the Lincoln Police Station, and later at F.B.I. headquarters (T.Tr.368) in Providence, pertaining to Mr. Housand's arrest with co-defendants Joost and Guillette two weeks before on April 27, 1972, by the Lincoln Police Department for possession of burglar tools (T.Tr. 304); that on May 10 and 11, 1972, he was told by the Lincoln Police Department Chief of Police and a Captain that they wanted him to tell them everything he knew about the alleged criminal activities of Joost and Guillette, and if he did not give them this information they would prosecute him for the possession of burglar tools, but if he did tell them, he would not be prosecuted; that he and certain other persons also had passed fraudulent American Express Money Orders in Rhode Island, when he had returned from North Carolina on April 18, 1972 (T.Tr.365) (A.39), and the F.B.I. agents told him that he would not be prosecuted for his participation in this Interstate Transportation and Uttering of the fraudulent money orders if he would tell them everything he knew about the alleged criminal activities of co-defendants Joost and Guillette (T.Tr.371) (A.39); that he told both the F.B.I. and Lincoln Police on May 11 and 12, 1972, what he knew about Joost

and Guillette in order to avoid being prosecuted (Tr. 372) (A.40), but he conceded on cross-examination that he did not mention anything about any alleged "conspiratorial" meeting which supposedly took place only three days earlier, wherein he was allegedly hired by defendants to shoot Mr. LaPolla for $5,000.00! (Tr. 372,373) (A.40,41); that he had a falling-out with the defendants shortly thereafter (Tr. 444), and on May 23, 1972, he received a severe beating by one Rickie Cochran in co-defendant Guillette's presence and at Guillette's direction (Tr. 445) (A.42), and was hospitalized with three broken ribs and a fractured cheekbone (Tr. 445); that while in the hospital on May 23 (Tr. 445), he was visited by an F.B.I. Agent who told him that they wanted him to tell them anything else he knew about the activities of Joost and Guillette (Tr. 446) (A.43) and that if he did not, he was going to be prosecuted for the Federal offense of interstate transportation of stolen money orders, for conspiracy, and also possession of burglar tools(Tr. 446) (A. 43). He admitted on cross-examination that he was very angry with Guillette, and he was hurting physically and he expressed his anger at Guillette to the F.B.I. agent (Tr. 446), only 15 days after the alleged 'conspiratorial' meeting with the defendant which supposedly took place at Carter's Jewelry Store, and yet he did not even mention this meeting to the F.B.I. agent! (Tr.447) (A 44). Mr. Housand testified that he left Rhode Island on June 13, 1972, without having carried out his alleged mission to shoot Mr. LaPolla, and on July 15, 1972, he was arrested in Fayetteville, Arkansas on an unrelated charge arising out of North Carolina (Tr.361) and remained in continuous custody from then until April 1974 when he was eventually paroled (Tr. 361). On April 15, 1973, some eleven months (Tr. 350) following the alleged 'conspiratorial' meeting, while in custody in North

Carolina (Tr. 350), Mr. Housand was visited by A.T.F. Agents Fowler and Watterson (Tr. 362). Mr. Housand testified that from 1965 up through the first time he spoke with A.T.F. Agents Fowler and Watterson in April 1973, with the exception of a few months he had been in almost continuous custody for eight years (Tr. 359) (A. 45) and had just been sentenced to an additional six years (Tr. 359,360) (A.45,46). These prior convictions included forgery in Omaha, Nebraska in 1965 (Tr. 351), Forgery and Escape in Lincoln, Nebraska, 1968 (Tr. 353), Interstate Transportation of Stolen Vehicles in North Carolina (Tr. 356), and in January 1973 three convictions for forgery and uttering for which he was sentenced to six additional years (Tr. 359). All of his convictions concerned misrepresentations and lying (Tr. 453,550) (A. 46,47) and using aliases such as John Smith, Charles Kirby, John Joseph Howard, Stephen Longvall and Marvin Dunkle, etc. (Tr. 353) (A. 47). He agreed that when the A.T.F. Agents first talked to him in April 1973, he wanted out of jail very badly (Tr. 359, 360) (A.45). Mr. Housand was promised by the Federal Agents that if he cooperated with them that they would request the United States Attorney to appear on his behalf before the parole board (Tr. 363). Mr. Housand agreed to cooperate and signed a statement for the A.T.F. Agents on April 19, 1973 (Tr. 378,447) but nowhere in this statement is there any mention of this alleged May 8, 1972, 'conspiratorial' meeting at which Attorney Bucci and the defendants allegedly were present (Tr. 448) (A. 45).

Mr. Housand further admitted that when he testified before the Federal Grand Jury in Hartford, Connecticut, in this regard on May 2, 1973, that he did not mention that Attorney Andrew Bucci was present at this alleged 'conspiratorial' meeting on May 8, 1972. (Tr. 449) (A. 48). When Mr. Housand came to Connecticut prior to testifying before the Federal Grand Jury in May

1973, he met with Assistant United States Attorney Paul Coffey, who promised him immunity from prosecution for any and all crimes he committed in Rhode Island and Connecticut (Tr. 364) (A. 49), including possession of burglar tools (Tr. 371), conspiracy, interstate transportation and uttering of stolen money orders (Tr. 366), a house burglary he committed just before he left Rhode Island (Tr. 367), and for any alleged participation in this LaPolla case (Tr. 364). Mr. Coffey also promised him that he would appear on his behalf before the Parole Board in North Carolina (Tr. 364) (A.49), and Mr. Coffey did, in fact, appear, and at the time of Mr. Housand's testimony in June 1974, he had already been released on parole (Tr. 364) (A. 50). Mr. Housand also received approximately one thousand dollars from the Government while he was in prison between April 1973 and April 1974, some in cash by A.T.F Agent Petrella (Tr. 374) (A. 50) and had a running account of approximately $85.00 per month at the commissary for toilet articles, etc., and upon his parole in April 1974, he received an additional $2,160.00 for relocation expenses (Tr. 375) (A. 50)

In addition, appellant Zinni respectfully, but most strongly urges that Mr. Housand's story of an alleged 'conspiratorial' meeting on the morning of May 8, 1972, was conclusively proven false by the contradictory testimony of the most credible defense witnesses, and that appellant Zinni's conviction was due in its entirety to the prejudicial effect of the highly inflammatory and inadmissible evidence of the tape recorded conversation pertaining to the alleged declaration of intention of co-defendant Marrapese to dynamite the Brooklyn, Connecticut Jail!

As stated previously, Mr. Housand testified that on Monday morning May 8, 1972, he and co-defendant Guillette traveled from Guillette's house in Guillette's vehicle to Carter's Jewelry Store, Cranston, Rhode Island, arriving at approximately 10:00 a.m. (Tr. 413, 530,531) (A.35,36) and Attorney Andrew Bucci, appellant Zinni and co-defendants Joost and Marrapese were already there when he arrived!(Tr.338) (A. 36). The meeting lasted approximately 15 minutes (Tr. 345,414) (A. 37) and then he and Guillette returned to Guillette's house (Tr. 421).

Testimony by a number of defense witnesses conclusively established that Attorney Andrew Bucci could not possibly have already been at Carter's Jewelry Store in Cranston, Rhode Island at 10:00 a.m. and for the 15 minute meeting thereafter, as Mr. Housand claimed in his testimony, and for the approximate 15 minute drive thereafter from Carter's Jewelry Store in Cranston to downtown Providence, since Mr. Bucci was in Providence Superior Court from shortly before 10:00 a.m. until shortly after noontime when he then went to lunch with another attorney!

In addition, according to defense testimony, appellant Zinni and co-defendant Marrapese were also present at the Providence Superior Courthouse during this same approximate period of time. [All of the defense witnesses were excluded from the Courtroom by Government motion so that they could not listen to each other's testimony (Tr. 1020,1031) (A. 37)]. [It should also be noted that at the trial of co-defendants Joost and Guillette, the prosecutor, Mr. Coffey, argued to the jury that there was a sufficient gap in the time for Attorney Bucci and the defendants to have traveled from the Superior Courthouse to Carter's Jewelry for the 15 minute meeting and return

to the courthouse between 10 a.m. and 12 noon. When the evidence presented at the trial of Marrapese and Zinni accounted for the time between 10 a.m. and 12 noon to the point where no sufficient gap in time existed for this round trip and meeting, the same prosecutor, Mr. Coffey, then switched his attack and argued to the jury that the meeting occurred either before 10 a.m. or 12 noon!]

The defense witnesses testified to the true facts as they occurred on Monday morning, May 8, 1972.

(A) There was a pretrial conference in the chambers of Superior Court Judge John S. McKiernan at which Attorney Andrew Bucci and several other attorneys were present from the beginning of the conference until its conclusion, [Judge McKiernan (T.Tr. 1086,1095) (A.52); Assistant Attorney General Edward Mulligan (T.Tr.1138); Attorney John Sheehan (T.Tr. 1126); Attorney John Kelly (T.Tr. 1100); Attorney Carmine Rao (T.Tr. 1110,1113).].

(B) This 'in chambers' conference commenced around 10:00 a.m. or within a few minutes thereafter. [Judge McKiernan testified ' around 10:00 o'clock' (T.Tr. 10-94-1095) (A. 53); Attorney Bucci testified he walked from his office to the Courthouse 1 1/2 blocks away with Attorney John O'Neill arriving at Judge McKiernan's chambers 'just prior to 10:00 a.m.' (T.Tr. 1241) (A. 54), and they entered the Judge's chambers shortly before 10:00 a.m. (T.Tr. 1242-1243) (A. 54). However, they immediately exited since the prosecuting attorney, Assistant Attorney General Edward Mulligan had not yet arrived (T.Tr. 1242) (A. 54) and when Mr. Mulligan and Attorney Carmine Rao arrived a short time later, they all entered the judge's chambers and the conference began (T.Tr. 1243) (A. 55); Attorney John Kelly testified that when he arrived at approximately 10:15 a.m. he believes the conference had already started (T.Tr. 1104) (A. 55); Attorney

John Sheehan testified that he arrived at the Judge's chambers at approximately 10:10 a.m. and the conference had already started and the other attorneys including Mr. Bucci were already present (Tr. 1125-1126) (A.58,59); Providence Police Officer Julio Fuina, the investigating officer testified that he arrived at Judge McKiernan's courtroom at 10:10 a.m. (Tr. 1024) (A.59). He did not see the attorneys enter the Judge's chambers, but no one entered after he arrived, and he saw all the attorneys, including Mr. Bucci exit from the Judge's chambers about 15 minutes before jury selection began, which commenced at exactly 11:35 a.m. (Tr. 1048) (A.59)].

(C) The 'in-chambers' conference concerned the question as to which of the several defendants including appellant Zinni and co-defendant Marrapese were going to go to trial that morning, and on which of a number of indictments (Tr. 1090, 1095) (A. 53). Also, Attorney Andrew Bucci informed Judge McKiernan, in chambers, that he wished to move for a continuance on behalf of appellant Zinni and co-defendant Marrapese due to the prejudicial publicity in the Rhode Island newspapers over the weekend concerning their arraignment the previous Thursday, May 4, 1972, in Hartford, Connecticut on charges relating to the theft of the M-16 rifles from the Westerly armory (Tr. 1089, 1244-1211). One case was selected for trial, State v. Robert Giorgi, who was represented by Attorney Carmine Rao (Tr. 1109, 1250) (A. 64).

(D) The 'in-chambers' conference terminated around 11:00 to 11:15 a.m. or thereabouts. [Providence Police Officer Julio Fuina testified that he saw the attorneys, including Andrew Bucci, exit from Judge McKiernan's chambers approximately 15 minutes or so before the jury selection process began, which commenced at exactly 11:35 a.m. (Tr. 1048) (A. 59). He also stated that the

the conference ended approximately forty-five minutes to an hour after he first arrived at the courtroom at 10:10 a.m. (T.Tr. 1025-1026) (A. 60). Attorney John Sheehan--testified that the conference ended between 11:15 and 11:30 a.m. (T. Tr. 1127) (A. 61); Attorney John Kelly--the conference ended at approximately 11:00 a.m. (T.Tr. 1105) (A.58); Attorney Andrew Bucci--it ended at approximately 11:00 a.m. (T.Tr. 1254-1255)].

(E) Following the termination of the conference, all of the attorneys left the judge's chambers and walked out into open court, and there was a few minutes delay while the stenographic reporter, Paul Rocheleau, pursuant to a telephone call from Judge McKiernan, traveled from his office on the fourth floor to Judge McKiernan's courtroom on the fifth floor, [Paul Rocheleau (T.Tr. 1068) (A. 62), Andrew Bucci (T.Tr. 1249) (A. 63)]. Attorneys Andrew Bucci,John O'Neill, Carmine Rao, and Assistant Attorney General Edward Mulligan remained in the courtroom. The other attorneys left and presumably went to their offices.

(F) After Paul Rocheleau, the stenographic reporter arrived at Judge McKiernan's courtroom, Attorneys Andrew Bucci and John O'Neill and Assistant Attorney General Edward Mulligan argued a motion to continue the cases of appellant Zinni and other co-defendants to another trial date due to the unfavorable publicity over the weekend concerning the theft of the m-16 rifles. (T.Tr. 1068-1248). The motions were stenographically recorded and took 10 minutes (Paul Rocheleau--T.Tr. 1073,1074) (A. 65). The transcript of this motion was admitted into evidence as Defendants' R (T.Tr. 1375) and contains the argument made by Attorney Andrew Bucci thereon (T.Tr. 1084-85) (A. 51) The motion to continue by Mr. Bucci and Mr. O'Neill was granted by the Court (T.Tr. 1250).

(G) After the motion to continue was granted, the Court took an approximate 5 minute recess (Paul Rocheleau--Tr. 1071) (A. 66). Attorney Andrew Bucci testified that during this brief recess he left the courtroom of Judge McKiernan and walked to the nearby courtroom on the same floor of Judge William McKenzie and withdrew his appearance on behalf of another defendant, Richard Harris, in an unrelated case (Tr. 1250) (A. 66). He had to obtain Judge McKenzie's approval in writing in order to withdraw his appearance. He spoke personally with Judge McKenzie, who gave his approval in writing on the 'Motion to Withdraw Appearance' forms(Tr. 1251) (A. 67). These forms dated May 8, 1972, and bearing Judge McKenzie's signature were marked for identification purposes as exhibits U and V.(Tr. 1319). Attorney Bucci arrived back in Judge McKiernan's courtroom just prior to commencement of jury selection in the case of State v. Robert Giorgi and sat on the opposite side of the room from the prospective jurors, next to defense counsel's table (Tr. 1252) (A. 68). Carmine Rao, defense counsel for Robert Giorgi, also testified to Attorney Bucci's presence at this location in the courtroom when jury selection commenced for the Giorgi trial (Tr. 1113) (A. 69).

(H) Jury selection commenced exactly at 11:35 a.m. and Attorney Andrew Bucci was present in Judge McKiernan's courtroom. Providence Police Dectective, Julio Fuina, the investigating officer on the State v. Robert Giorgi case, a veteran of the Providence Police Department for 20 years (Tr. 1019) (A. 60), and named 'Policeman of the Year' in 1972 (Tr. 1040) (A.70) testified that he was present in Judge McKiernan's courtroom on the morning of May 8, 1972, and sat next to the prosecutor, Edward Mulligan, at counsel

table during jury selection and the trial (Tr. 1030, 1035) (A. 71). [Jury selection was very rapid, the attorneys accepting the first twelve jurors called (Tr. 1142).] At that time, Detective Fuina recorded the exact time that jury selection commenced, 11:35 a.m. and the exact time that jury selection ended, 11:52 a.m., on one of the jury lists that he had in his possession at that time (Tr. 1035) (A. 71). This jury list bearing these notations was admitted into evidence as defense exhibit Q (Tr. 1045) (A. 73). Detective Fuina testified that he not only saw Attorney Bucci exit with the other attorneys from Judge McKiernan's chambers (following the in-chambers conference which ended at approximately 11:00 a.m. (Tr. 1025-1026) (A. 77) (Tr. 1948) (A. 78), but also that Attorney Bucci was seated in Judge McKiernan's courtroom next to the defense table when jury selection began at 11:35 a.m. (Tr. 1036) (A. 72), and that he was still seated there after the jury was finally selected at 11:52 a.m.(Tr. 1049-1059) (A. 73). Attorney Bucci testified that he remained in the courtroom until just before the noon recess and then had lunch with Robert Giorgi's attorney, Carmine Rao(Tr. 1254) (A. 75) (Tr. 1255) (A. 82).

(I) And concerning the presence of appellant Zinni and co-defendant Marrapese in the Providence Superior Courthouse on the morning of May 8, 1972, between 10 a.m. and 12 noon, several witnesses so testified. Attorney John Kelly testified that he saw appellant Zinni in the corridor outside Judge McKiernan's courtroom when he first arrived between 10:00 and 10:15 a.m. (Tr. 1103, 1104) (A. 75), and saw both appellant Zinni and co-defendant Marrapese in this same corridor when the 'in-chambers' conference ended at approximately 11:00-11:15 a.m. (Tr. 1102, 1103) (A. 75). Assistant Attorney

General Edward Mulligan testified that he also saw co-defendant Marrapese outside the courtroom sometime that morning (T.Tr. 1143,1144) (A. 76). Detective Fuina testified that he held a conversation with both appellant Zinni and co-defendant Marrapese and several other persons in the hallway outside Judge McKiernan's courtroom between the time he first arrived at 10:10 a.m. and approximately 15 minutes before jury selection began at 11:35 a.m. (T.Tr. 1026-27) (A. 77) (T.Tr.1057-58) (A. 78). Attorney John Sheehan testified that he believes he saw both appellant Zinni and co-defendant Marrapese that morning at the courthouse (T.Tr. 1127) (A.79). And Attorney Andrew Bucci testified that he saw both appellant Zinni and co-defendant Marrapese at the courthouse when the 'in-chambers' conference ended at approximately 11:00 a.m. (T.Tr.1244-45) (A. 79); (T.Tr. 1254-55) (A. 79).

(J) In addition, A.T.F. Agent Frederick Connell (T.Tr. 990) testified that on the morning of December 18, 1973, he and his partner, in an automobile, made two round trips from the Providence County Superior Courthouse in Providence, from the front and rear entrances respectively, to Carter's Jewelry Store , in Cranston, and return, and timed each trip. (T.Tr. 993-1001) (A. 79). The trips from the Providence Superior Courthouse to Carter Jewelry STore took approximately 15 minutes each (T.Tr. 994) (A.80); (T.Tr. 1001) (A. 79). The return trips from Carter's Jewelry Store to the Courthouse were at a faster speed, in excess of 50 miles per hour, and slightly different route, and took approximately 11 minutes each (T.Tr.997). Therefore, in order for Attorney Andrew Bucci and appellant Zinni and co-defendant Marrapese to make the 15 minute trip from the Providence Superior Courthouse to Carter's Jewelry Store in Cranston, stay for an alleged 15 minute 'conspiratorial' meeting and make the 11 minute return trip to the Providence Superior Courthouse, would require a lapse of time of approximately 41 minutes. (Just the

15 minute meeting plus the 11 minute trip to the Providence Superior Courthouse from Carter's Jewelry Store requires a lapse of time of 26 minutes.)' And this 41 minute lapse would be much longer when it is also taken into consideration that A.T.F. Agent Connell drove from directly in front of the Providence Superior Courthouse entrance (Tr. 993,998), (rather than having to exit from the Courthouse and walk several hundred feet to the nearby parking lot (Tr. 1003) and pay the attendant, etc., or walk the 1 1/2 blocks to Attorney Bucci's office in order to obtain an automobile), plus, enroute he encountered seven green lights in a row (Tr. 997, 999) (A. 80), and no one was at either of the two pedestrian stop signs on either trip (Tr. 997,999) (A. 80). It is immediately obvious in analyzing the testimony given by the defense witnesses above, that nowhere between shortly before 10:00 a.m. until after noontime is there any 41 minute (or even 26 minute) lapse of time when Attorney Andrew Bucci was not present either in Judge McKiernan's chambers, or his courtroom, or in Judge McKenzie's courtroom. Accordingly, Mr. Housand's testimony that Attorney Bucci was already at Carter's Jewelry Store in Cranston when Mr. Housand allegedly arrived with Guillette around 10:00 a.m. and remained there for a 15 minute 'conspiratorial meeting has been conclusively contradicted and outweighed by the testimony of these most credible defense witnesses! Further, the evidence indicated that all attorneys and defense counsel were informed on Monday, May 1, 1972, that the trial date was set for Monday morning, May 8, 1972, and it is completely illogical, therefore to assume that a 'conspiratorial' meeting would be scheduled for this same date and time, (and to be held at an alleged business establishment, Carter's Jewelry Store, which the evidence later revealed was no longer in existence as such on that date.)

Appellant Zinni respectfully contends, therefore, that his conviction was due in its entirety to the highly prejudicial and inflammatory tape recording concerning the alleged declaration of intention to dynamite the Brooklyn, Connecticut Jail, and that the Trial Court committed error in its weighing of the evidence and the credibility of the witnesses, and in its ruling denying appellant Zinni's Motion for a New Trial on the ground that the verdict is against the weight of the evidence, and further, that such judicial error deprived the appellant of his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

II. THE TRIAL COURT'S RULING , ADMITTING INTO EVIDENCE CERTAIN TAPE RECORDINGS AND THEIR CONTENTS AND WRITTEN TRANSCRIPTIONS THEREOF, DEPRIVED THE APPELLANT ZINNI OF HIS GUARANTEES PURSUANT TO THE FOURTH, FIFTH,SIXTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

During the prosecution's case-in-chief and just prior to the testimony of the prosecution's main witness, John Anthony Housand, the Government introduced into evidence, after a voir dire hearing, and over defense objection (T.Tr. 177 (A. 81) a tape recording, Government Exhibit Number 34 (T.Tr. 179). Portions of this tape recording were then played to the jury in open court. Each juror was furnished by the Government, over defense objection (T.Tr. 177), with a typewritten transcription, Government Exhibit 35, (T.Tr. 179) of that portion of the tape recording which was to be played, and the jurors read along from these typewritten transcriptions while the tape recordings were being played. (T.Tr. 188-190). After all defense objections had been overruled, the Court was requested by the defense to instruct the jury as to the limited purpose for which the Government was offering the tape state of mind, etc., but the Court refused (T.Tr. 189) (A. 86). Appellant Zinni respectfully contends that the prejudicial impact of this tape recording was so overwhelming that it immediately and irrevocably deprived him of any possibility of receiving a fair trial by an impartial jury, as guaranteed by the Sixth Amendment to the United States Constitution!

The very heart of the prosecutions'case at the trial was that appellant Zinni conspired and performed certain acts alone and with others which eventually resulted in the murder of Daniel LaPolla, a prospective Government witness,by the use of dynamite on September 29, 1972. And the very heart of the content of the most prejudicial portion of the tape recording, which was played to the trial jury was to the effect that co-defendant Marrapese in

March of 1972, approximately five weeks before the Government contends a conspiratorial meeting took place allegedly stated to Mr. LaPolla during this tape recorded conversation that he co-defendant Marrapese, had eight sticks of dynamite, and was going to blow up the entire jail at Brooklyn, Connecticut, including all of its occupants, in order to murder some other person inferentially, another Government witness (not John A. Housand, he was in a North Carolina jail). Certain portions from the entire tape recording were selected by the prosecution to be played to the jury:1

1
"William Marrapese: You know where the Brooklyn Jail is?
Daniel LaPolla: Yeah, I know where it is. Why?
William Marrapese: (unclear) jail is (unclear)
Daniel LaPolla: Cracker box.
William Marrapese: (unclear) soft?
Daniel LaPolla: Sure.
William Marrapese: How far is it from your house?
Daniel LaPolla: (unclear) Have you ever been to Danielson,Connecticut?
William Marrapese: That's what I said, near a rotary. (unclear) The old road to New York.
DanielLaPolla: Yeah. You know how big the school is on (unclear) street used to be. I'm just telling you the school, you know how big that used to be.
William Marrapese: (unclear) street school.
Daniel LaPolla: Yeah.
William Marrapese: How big in comparison to (unclear)
Daniel LaPolla: (unclear) How many cells? It isn't big. That's all.
William Marrapese: A big city block.
Daniel LaPolla: It's like a big apartment house, Billy. It's like a big apartment house, like about four or five stories high, and maybe about two lots, no more than two or three lots (laughing). Your kidding? Let me know so I can (unclear)

****

Daniel LaPolla: (unclear) Hey Billy, you trying to get rid of the rat population up there?
William Marrapese: Yeah (unclear)
Daniel LaPolla: Ahh. Who's up there?
William Marrapese: Huh?
DanielLaPolla: WHO'S UP THERE?
William Marrapese: THEY GOT ALL KIND OF WITNESSES (unclear)
Daniel LaPolla: Up there?
William Marrapese: (unclear) That big nose. JUST ONE, ONE NIGHT THE WHOLE PLACE IS GOING TO GO TO HEAVEN.

Daniel LaPolla: Ahh. That thing that--ahh.
William Marrapese: Yeah.
DanielLaPolla: THEY GOT HIM UP THERE?
William Marrapese: WE FIGURE IF THE WHOLE JOINT GOES, WE'RE GUARANTEED TO GET HIM."

Appellant Zinni respectfully contends, that any doubt which may have existed in the minds of the jurors as to his complicity in Daniel LaPolla's murder by dynamite, would be immediately dispelled once the jury was made aware that only six months earlier co-defendant Marrapese allegedly stated his intention to murder another alleged Government witness by this same method, the use of dynamite!

The highly inflammatory nature of this evidence becomes even more obvious when one considers that it entails the potential homicide of perhaps several hundred persons, including prisoners and guards alike, at the Brooklyn Connecticut Jail!

In addition, the conversation heard by the jury when the tape recordings were played allegedly included not only the voice of the appellant Zinni, co-defendant Marrapese but also that of the now deceased Daniel LaPolla, somewhat akin to the expression "like a voice from the grave."

The conversation allegedly between co-defendant Marrapese and Daniel LaPolla on the tape recordings did not reveal the identity of the person who was by inference some other Government witness at the Brooklyn Jail. However, this unidentified person would not have been a potential witness for the instant trial of appellant Zinni for the death of Daniel LaPolla since Mr. LaPolla was obviously alive at the time and participating in the tape recorded conversation. And there was no evidence offered to show any connection or relationship of the Brooklyn Jail witness with the death of Daniel LaPolla or that he was a potential witness concerning the theft of the M-16 rifles.

"Daniel LaPolla: Aw, that's easy. But let me know, so my ears, you know, cause I'm only a stone's throw away from the joint.
William Marrapese: Oh, you'll hear it.
Daniel LaPolla: Guaranteed?
William Marrapese: Eight sticks (unclear)
Daniel LaPolla: Oh, yeah.
William Marrapese: (banging sound) That's what's you'll hear,Dan.
Daniel LaPolla: Hurt my eardrums (unclear)"

Appellant Zinni respectfully contends, therefore, that the prejudicial effect of this evidence tremendously outweighed its probative value and that, therefore, under the law and the unique facts and circumstances of this case, the Trial Court's ruling admitting the content of this tape recording into evidence was reversible error. In United States v. Lee and Vaught, 485 2d 320, (4th Cir.) The United States Court of Appeals held that the Trial Court erred in not striking from the record evidence of acts and statements of co-conspirator prior to the existence of any proven conspiracy. The Court went on to call it plain error.

Apparently, the Government's theory of admissibility is that this is evidence of a "prior act or offense". The appellant Zinni agrees that there is a well established practice in the Courts throughout the United States, including the Court of Appeals for the Second Circuit, allowing the admission into evidence of prior similar acts, including crimes, when it is substantially relevant for a purpose other than merely to show defendant's criminal character or disposition. United States, v. Deaton, 381 F2d 114,117 (2nd Cir. 1967); United States v. Bozza 365 F2d 206,213, (2nd Cir. 1966); United States v. Kaplan, 416 F.2d 103,104 (2nd Cir. 1969); United States v. Bradwell, 388 F.2d 619, 622 (2nd Cir. 1968)

However, appellant Zinni respectfully contends that under the law and the facts of the instant case this evidence was inadmissible for several

reasons.

(A) The Trial Court erred in admitting the tapes because of their unreliability.

(1) Agent Smith's expertise or lack thereof, cannot establish authencity.

(2) The quality of the tapes was so poor that they should have been excluded.

(3) Agent Smith pre-empted the jury's function.

(B) The alleged statements of appellant Zinni DID NOT CONSTITUTE an illegal act, nor the commission of a "PRIOR OFFENSE" or crime.

(C) Applying the so-called 'Balancing Test' set forth in United States v. Bradwell, 388 F.2d 619 (2nd Cir. 1968) and other cases,

(1) the proof offered by the Government of the alleged commission of any so-called 'prior offense' was NOT PLAIN, CLEAR, CONVINCING, AND CONCLUSIVE , but was, rather, of a vague and uncertain character, if anything at all,

(2) the defense did nothing to "PUT IN ISSUE" or "SHARPEN ANY ISSUE" in the case, thereby CREATING ANY "NECESSITY" for the Government's use of this evidence during the trial of this case under any of the recognized exceptions to the general rule of inadmissibility of prior offenses, such as, motive, intent, identity, possibility of accident or mistake, common scheme or plan, etc.,

(3) the PROBATIVE VALUE of the evidence was so tremendously OUTWEIGHED BY ITS "PREJUDICIAL CHARACTER," that unquestionably the jury would "be roused by the evidence to overmastering hostility," thereby depriving appellant Zinni of his right to a fair trial by an impartial jury as guaranteed by the Sixth Amendment to the United States Constitution.

(D) The initial obtaining of tape recording by the Government was accomplished in such a manner as to violate the appellant Zinni's constitutional guarantees pursuant to the Fourth, Fifth and Ninth Amendments to the United States Constitution.

Concerning (A) (1) above, the appellant Zinni respectfully contends that the Trial Court erred in admitting the tapes because of the manner in which the tapes were made. Agent Smith, on cross-examination, stated that he was employed by the I.R.S. of the United States Government as a Special Agent (T.Tr. 247), and that his primary duty was that of investigations of income tax evaders. (T.Tr. 257). He testified that he put the receiver and antenna at or near the open window of the car; that the street on which the car was parked, in which they were taping the conversation, was busy and heavily traveled (T.Tr. 191); that he didn't know whether or not weather has anything to do with recording of voices nor if atmospheric conditions had anything to do with recording (T.Tr. 192). Agent Smith further testified that he had never studied voice identification (T.Tr. 231) that of the 100 to 125 recordings that have been made 25 were made in criminal matters and about 100 didn't have anything to do with his job but were made at home. (T.Tr. 258).

On the basis of the testimony elicited from Agent Smith to say the least his qualifications as a voice expert or interpreter left much to be desired and on that basis alone the tapes and transcripts thereof should have been excluded.

Concerning (A) (2) above, the appellant Zinni respectfully contends that the tapes in question were so lacking in quality as to defy reason in the Government's use of them as evidence. Agent Smith testified that he had to

play the tapes 100 to 125 times to try to fathom out what the words on the tapes were in the making of the transcript and that usually replaying tapes 10 or 15 times is sufficient to enable to transcribe a tape (T.Tr. 212). He admitted that the tapes in question were of "poor" quality on a scale of poor, mediocre, or good (T.Tr. 191).

Concerning (A) (3) above, the appellant Zinni respectfully contends that Agent Smith pre-empted the jury's function. Agent Smith testified that he had to make judgments on who said what after playing the tapes 100-125 times. Further, he testified that he determined those portions that were unimportant and that he excluded those portions and that he made that consideration alone. (T.Tr. 212)

For the above stated reasons Trial Court should have ruled as a matter of law that the tapes in question together with their transcripts were so unreliable as to make them unworthy of belief and of no probative value.

Concerning (B) above, the appellant Zinni respectfully contends that the alleged declarations and utterances do not constitute an illegal act, prior offense or crime. During the trial there was no proof offered by the Government that the appellant Zinni dynamited or even attempted to blow up the Brooklyn Jail, nor of any agreement constituting a criminal conspiracy to commit such an offense. Nor can these declarations be construed to be admissions or a confession in the instant case involving the death of Daniel LaPolla by the use of dynamite, for the obvious reasons that the tape recorded conversation in March of 1972, not only preceeded by apporximately six months the death of Mr. LaPolla in September, 1972, but also the alleged conspiratorial meeting by 5 or 6 weeks. Further, there was no evidence offered by the Government showing any relationship or connection between the utterances concerning

the alleged Brooklyn Jail 'witness' and Mr. LaPolla as a potential witness in the M-16 rifle case. The evidence indicated a complete lack of awareness by the appellant Zinni at that time that Mr. LaPolla was surreptitiously acting as a Government informant. In any event, appellant Zinni respectfully contends that the declarations of intention or threats, of another, are not admissible in evidence as against him under the law pertaining to 'prior acts, offenses or crimes'.

In Commonwealth v. Kluska, 3 A.2d 398 (1939--Pa) the Court ruled that the making of a threat to kill the mother and sister of the deceased wife was inadmissible at the trial for the murder of the wife, since the making of a threat to commit a collateral offense is inadmissible. Wiley v. State 324 SW 2d 862 (1959--Texas) concerned a burglary prosecution wherein the prosecution offered proof that the defendant committed the break with the intention to commit other offenses is not admissible.

Even in situations wherein an actual attempt to commit a prior crime is offered by the Government the Courts have ruled such evidence inadmissible. In People v. Whalen,160 P.2d 560 (1945), a rape prosecution, wherein repeated prior attempts at rape were offered by the Government at the trial, the Court, relying on People v. Glass 158 Cal.650, 112, P.281,293 (1910) ruled the evidence inadmissible, stating that "the law does not sanction the introduction of evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury." In State v. Atkinson, 285 SW 2d 563 (1965--Mo.), the Government introduced evidence of first attempts at child molesting at the trial for the performing of the act. The Court in ruling stated that "the rule of exclusion to which we have referred extends to proof of threat, intention or willingness on the part of the accused to commit another crime."

Concerning (C) above, that is, by applying the so-called 'Balancing

Test' set forth in United States v. Bradwell, 388 F.2d 619 (2nd Cir. 1968) the appellant Zinni respectfully contends that the evidence of the tape recording offered as a 'prior act' or ' prior offense' was inadmissible on several grounds. In the Bradwell case this Honorable Court stated as follows:

> "...we hold rather that evidence of another crime may be admitted if it 'is substantially relevant for some purpose than to show a probability' that the defendant 'committed the crime on trial because he is a man of criminal character', with admission to depend upon the trial judge's appropriately balancing on the one side the ACTUAL NEED for the other crimes evidence, in light of the issues, and the OTHER EVIDENCE AVAILABLE to the prosecution; the convincingness of the evidence that the OTHER CRIMES WERE COMMITTED and that the accused was the actor, and the strength or weakness of the other crimes evidence in supporting the issue; and on the other, the DEGREE TO WHICH THE JURY WILL PROBABLY BE ROUSED by the evidence to over mastering hostility." (Emphasis added)

Initially, as stated in (C) (1) above, the appellant Zinni respectfully contends that the proof offered by the Government of the alleged commissions of any so-called 'prior act or offense' by a co-defendant and not the appellant Zinni, but imputed to him, was not plain, clear, convincing and conclusive, but was, rather, of a vague and uncertain character if anything at all. In this regard, the Government took various 'selected' excerpts from the entire tape recording and played only these 'selections', one immediately following the other, for the jury to hear while they read along from a typewritten transcript. This method created a 'word picture' basing inference upon inference. The identity of the person in the Brooklyn Jail, who was the alleged target of such bombing was never established, nor that he was a potential Government witness in any particular case, against any particular defendant, if indeed he was to be a witness at all. And, from this sketchy evidence, the Government argues that the utterances of a co-defendant constitutes a 'prior similar act' to dynamite another potential Government witness against the appellant Zinni

without any clear and convincing foundation in fact. In the case of Labiosa v. Government of the Canal Zone, 198 F.2d 282 (5th Cir. 1952), during a defendant's trial for statutory rape, the Government's counsel cross examined the defendant as to conversations with a police officer in which defendant allegedly informed the police officer of his techniques for prior statutory rapes. The defendant denied having made any such statements to the officer. The Trial Court allowed the police officer to take the stand and confirm that the statement, which was recited by Government's counsel, was made by the defendant. The Government contention was that this statement to the officer constituted evidence of 'prior similar acts.' The Court on appeal ruled that it was error to allow proof of a 'prior similar act' by the recitation of some statements allegedly made by the defendant. In finding this proof insufficient the Court set down the standard to which proof of a 'prior similar act' must be held when it stated at page 285:

> "Nevertheless, recognizing the danger inherent in such proof that the defendant may in fact, be improperly prejudiced by the confusion of issues, or the likelihood that the jury may illogically assume that since the defendant committed one offense he may well, for that reason alone, be guilty of another it is required that the proof of such similar offense be clear and that evidence of a vague and uncertain character regarding such an alleged offense should not be admitted."

The case of Kraft v. United States,238,F.2d 794,802 (8th Cir. 1956) elaborated on the clear proof test stated in Labiosa (supra). And, in the United States v. Spica, 413 F.2d 129 (8th Cir. 1969) the Court stated at page 802:

> "In cases falling under such ar exception to the rule [question of intent], however, it is essential to the admissibility of evidence of another distinct offense that the proof of the latter

> offense be plain, clear, and conclusive. Evidence of an vague and uncertain character regarding such an alleged offense is never admissible."

This strict requirement for the proof of a 'prior similar act' is also noted in McCormick, Evidence, Section 190 at pages 451,452 (1972):

> "In the first place, it is clear that the other crime, when it is found to be independantly relevant and admissible, need not be established beyond a reasonable doubt, either as to its commission or as to defendant's connection therewith, but for the jury to be entitled to consider it there must of course, be substantial evidence of these facts and some courts have used the formula that it must be 'clear and convincing'. And it is believed that before the evidence is admitted at all, this factor of the substantial or unconvincing quality of the proof should be weighed in the balance."

Concerning (B) (2) above, the appellant Zinni respectfully contends, that at the time during the prosecution's case-in-chief, when the Government offered into evidence the tape recording and the transcription of certain excerpts therefrom, followed by the playing of such excerpts therefrom, followed by the playing of such excerpts to the jury, this evidence of an alleged 'prior act or offense' was not then admissible under any of the recognized exceptions to the general rule of inadmissibility, such as, motive, identity, intent, lack of accident or mistake, common scheme or plan, etc., nor, had the defense "put in issue" or "sharpened any issue" in the case, thereby causing or creating any "actual need" for the use of this evidence either during the prosecution's case-in-chief or in rebuttal. In fact, during the prosecution's presentation of its evidence in its case-in-chief, and before the tape recording was offered by the Government and admitted into evidence by the Court, the defense and the prosecution stipulated in the jury's presence (a) that Daniel LaPolla was killed by the use of a dynamite bomb, and (b) that Daniel LaPolla did not commit suicide, did not die by accident, and did not place the explosive device which killed him (T.Tr. 84) (A. 51). Further, over defense objection (T.Tr. 5) the indictment concerning the theft of the M-16 rifles was read in its entirety to the

jury by the prosecution (T.Tr. 7-11) (A. 27), alleging that the named defendants, including appellant Zinni, did conspire with Daniel LaPolla, and setting forth certain overt acts, but not naming Daniel LaPolla, as a co-defendant. The prosecution's intention in reading this was to indicate to the jury, that when the defendants were arraigned on this indictment on May 4, 1972, they then became aware that Daniel LaPolla was obviously a Government informant against them in the M-16 gun case, and thus, they had a motive to kill him. This evidence bears directly on the tape recorded evidence concerning the dynamiting of the Brooklyn Jail. The prosecution's main witness John Anthony Housand, testified at great length (T.Tr. 282-567) on these issues of motive, intent and identity, to certain alleged statements by the defendants as to their awareness that Daniel LaPolla was a prospective Government witness against them on the M-16 gun case, and as to their allegedly hiring John Anthony Housand to shoot Daniel LaPolla. Appellant Zinni did not testify in his own defense, nor was there any 'alibi' defense as to the actual date of the death of Daniel LaPolla September 29, 1972. In fact, the entire defense consisted merely of an attempt to contradict the statement of prosecution witness, John Anthony Housand, that he had an alleged 'conspiritorial' meeting on May 8, 1972. The testimony of the defense witnesses pertained to the presence of Mr. Bucci, Mr. Zinni and Mr. Marrapese in the Providence Superior Courthouse on the morning of May 8, 1972 and therefore, not at any alleged meeting with Mr. Housand at Carter's Jewelry Store (T.Tr. 1018-1154). Thus, in no way did the defense "put in issue" or "sharpen any issue" in the case thereby causing or necessitating the Government use of this highly prejudicial and inflammatory so-called 'prior act or offense' tape recorded evidence EVEN IN THE PROSECUTION'S REBUTTAL EVIDENCE MUCH LESS IN THEIR CASE-IN-CHIEF!

Furthermore, appellant Zinni alleges that the careful TIMING utilized by the prosecution in this case is all important. The testimony of the law enforcement officers concerning the facts surrounding the obtaining of this tape, and the actual playing to the jury of this tape recorded conversation, as to an alleged intent by another to dynamite the Brooklyn Jail and the entire prison population, immediately preceded the testimony of the prosecution's star witness, John Anthony Housand. And, in this prosecution, the Government's entire case was based, for the most part, upon the credibility of this one witness , John Anthony Housand. Appellant Zinni respectfully contends, that the introduction by the Government of this highly inflammatory tape recorded evidence in their case-in-chief immediatelyprior to Mr. Housand's testimony, was an obvious prosecution attempt to provide a solid foundation or support for any possible shakiness in Mr. Housand's credibility as a Government witness. Any so-called "actual need" for this highly prejudicial and inflammatory evidence, therefore, was not caused by the defense "putting in issue" or "sharpening any issue" in the case! In United States v. Byrd 352 F.2d 570 (2nd Cir. 1965) the defendant was an office auditor for the Internal Revenue Service who was charged with accepting money from an accountant named Kaufman to 'Okay' the returns of some of Kaufman's clients. Kaufman, after testifying to the transaction charged, also, over defense objection, testified to an almost identical transaction involving clients of his that were not mentioned in the indictment. At page 574 this Honorable Court applies the 'Balancing Test' as follows:

> "The exercise of discretion must be addressed to a balancing of the PROBATIVE VALUE of theproffered evidence, on the one hand, AGAINST ITS PREJUDICIAL CHARACTER on the other. The probative value is measured by the extent to which the evidence of prior criminal activities, other than a conviction, closely related in time and subject matter, tends to establish that the accused committed the criminal act charged in the indictment knowingly or with criminal intent, or tends to negative the claim that the acts were committed innocently, or through mistake or misunderstanding."

The Court went on to add:

> "From the quality of proof standpoint for proving knowledge and intent , its probative value was largely cumulative. The evidence came from the mouth of the same witness, Kaufman, who testified to the occurrences in the first two counts..."
>
> "...Another factor to be considered is WHETHER THE GOVERNMENT WAS FACED WITH A REAL NECESSITY which required it offer the evidence in its main case. The defense had not either in its claims or the statement of facts which it would seek to prove "sharpened" the issue of intent by asserting that the act charged was done innocently or by accident or mistake...Nor did the government suffer from a lack of evidence of intent... There was therfore, no pressing necessity that the evidence of that prior occasion be offered on the Government's main case. United States v. Ross, 321 F.2d 61,67 (2nd Cir. 1963)... For the present purpose of this discussion it is enough to point out that the scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of intent in the Government's main case. WHERE THE PREJUDICE IS SUBSTANTIAL AND THE PROBATIVE VALUE THROUGH THE NATURE OF THE EVIDENCE OR THE LACK OF ANY REAL NECESSITY FOR IT, IS SLIGHT, ITS ADMISSION AT THE STAGE MAY BE HELD TO BE AN ABUSE OF DISCRETION. [REMANDED FOR A NEW TRIAL.]" (Emphasis added)

United States v. Ross (supra) cited in the Byrd decision was one of the Kimbal Securities cases, which was a 'boiler room operation' whereby near-to worthless securities were sold by the defendant and others to individuals around the country. At the trial the defendant objected to cross examination in the area of his past activities as a securities salesman, saying that it was insinuated prior misconduct. At page 67 this Honorable Court stated in part:

> "...when the crime charged involves the element of knowledge intent or the like, the State will often be permitted to show other crimes IN REBUTTAL, AFTER THE ISSUE HAS BEEN "SHARPENED" BY THE DEFENDANT'S GIVING EVIDENCE OF accident or mistake, more readily than it would as part of its CASE-IN-CHIEF at a time when the Court may be in doubt that any real dispute will appear on the issue. Here Ross had sought in his direct testimony to depict himself as an unwitting tool in Kimball's iniquitous venture, it was wholly proper for the Government to rebut this claim of ignorance and innocence." (Emphasis added)

Appellant Zinni respectfully contends that his case presents a much stronger argument for inadmissibility than either the Byrd or Ross cases previously cited. The Byrd case presented not merely a similar act, but an identical 'prior offense'. In the instant case of appellant Zinni, as previously discussed, there is a serious question whether or not any 'prior offense' at all is present as opposed to a mere declaration of intention or possible threat at best and at that a declaration of another. There is further the matter of the lack of the clear and convincing quality of the evidence offered. And as in the Byrd case and unlike the Ross case, in the instant case of appellant Zinni nothing was done by the defense to "sharpen any issue" thereby creating any "real necessity" for the Government's use of this evidence. It should be noted that in Ross the evidence was ruled properly admissible, not in the prosecution's main case, but only in rebuttal after the defendant himself "sharpened" any issue in the case. And it was stipulated that there was no issue of accident or mistake in the death of Daniel LaPolla. Also, in both the Byrd and Ross decisions, the acts done by the defendants were equivocal as to the intent accompanying such act. In the instant case of appellant Zinni, however, the act of killing a man by blowing him up with dynamite is not equivocal in nature as far as the intent accompanying the act is concerned. The act speaks for itself as to this issue.

Further, by analogy, in the Byrd and Ross cases, the prejudicial effect of the 'prior offense' evidence concerning mere prior fraud transactions, in no way compares with the alleged 'prior act' evidence in appellant Zinni's case consisting of the highly inflammatory statement of intention of another to dynamite an entire jail facility including the entire prison population of perhaps several hundred people! Therefore, appellant Zinni respectfully alleges that this Honorable Court's reasoning in the Byrd decision should be even more

applicable to his case.

Concerning (B) (3) above, under the so-called 'Balancing Test' set forth in United States v. Bradwell (supra) , United States v. Byrd (supra) , and other cases authority within the jurisdiction of this Court of Appeals for the Second Circuit as well as throughout the United States, the appellant Zinni respectfully alleges that the prejudicial effect of the content of the tape recorded conversation concerning the dynamiting of the Brooklyn Jail tremendously outweighed its probative value! In virtually every case wherein such evidence of 'prior act or offense' has been admitted, this 'prior evidence' has pertained to virtually identical, non-inflammatory types of offenses. For example, United States v. Deaton, 381 F.2d 114 (2nd Cir. 1967) entailed three similar fraudulent mortgage transactions; United States v. Bozza 365 F.2d 206 (2nd Cir. 1966). Another post office burglary prior to the post office burglary charged in the indictment; United States v. Johnson, 382 F.2d 280 (2nd Cir. 1967) in a trial for the theft of interstate shipments, evidence was admitted that at a prior time a trucking company delivery man was struck in the face and held up by the defendant. In other cases the evidence has been ruled inadmissible because "it unduly confuses the decision of the issue on which the case must finally turn, and makes it likely that the jury may substitute the general moral obliquity of the accused." United States v. Smith 283 F.2d 760 (2nd Cir. 1960) A similar rationale was stated in Michelson v. United States 335 U.S.469 (1948). Also, in Kempe v. United States 151 F.2d 680 (2nd Cir. 1945) the Court held that proof of other crimes cannot be shown to prove a habit or disposition of the accused to commit a crime on the ground that such proof would show a probability of the defendant to commit the crime charged. Appellant Zinni would also respectfully ask this Honorable Court to take note that in the instant case of appellant Zinni virtually the entire defense was

directed at the attempted impeachment of the Government's principal witness, John Anthony Housand, both by cross examination of Mr. Housand and by the testimony of virtually every defense witness. In United States v. DeCicco 435 F.2d 478 (2nd Cir. 1970) a prosecution for receiving stolen property, the Government sought to introduce prior receiving transactions between the defendant and the government's principal witness, one Paul Parness. The Court of Appeals for the Second Circuit stated:

> "In this case almost the entire defense was the attempted impeachment of the Government's principal witness Paul Parness."

This Honorable Court ruled that the defense strategy in the DeCicco case was principally designed at attacking the credibility of the Federal witness, and that:

> "Therefore, whatever probative value the prior crimes.... added to the prosecution's case on the issue of the defendant intent to commit the conspiracy here claimed was far outweighed by the unwarranted inference the jury was permitted to draw..."

Thus, in the DeCicco case, the Court speaking through Judge Waterman ruled that the other crimes evidence was not admissible, finding that its prejudicial effect far outweighed any probative value it might have. In fact, the fact that the defendant's defense was not based on lack of knowledge or intent, but almost entirely, as in the instant case of the appellant Zinni, upon the lack of credibility of the Government's main witness!

Further research on behalf of appellant Zinni has uncovered not one case of those cases wherein the evidence of a 'prior act or offense' has been a highly prejudicial and inflammatory as the instant conversation between someone other than the defendant and a future murder victim himself, and pertaining to the dynamiting of an entire jail together with its entire population of perhaps

several hundred occupants! And, it should also be noted that in addition to the resulting prejudice from the use of such highly prejudicial and inflammatory evidence of 'prior acts or offenses' as a statement of intention to dynamite an entire jail and all of its occupants, there is always the present danger that the jury will convict a person of a subsequent offense when they learn that the defendant has allegedly committed a prior similar act or offense. The very fact that it is much easier to believe in the guilt of an accused person, when it is known or suspected that he has previously committed a similar crime proves the dangerous tendency of such evidence to convict not upon the evidence of the crime charged, but upon the super-added evidence of the previous crime. A classic case would be, for example, of a physician on trial for abortion who denies having committed any such abortion, and then it is revealed to the jury that the physician has committed a prior similar abortion. In most instances, for all practical purposes, the trial is all over, and the physician's guilt resolved, as soon as such occurs! In Shaffner v. Commonwealth 72 Pa.St.63 the highest Court of Pennsylvania stated:

> "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor linking them together for some purpose he intended to accomplish or, it must identify the person of the actor by a connection which show that he who committed the one must have done the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which he would be acquitted, if fairly tried."

And the prosecution in this case was not content to play the tape recording only once to the jury while the jury read along from the written transcription thereof immediately preceeding the testimony of the Government's principal witness, John Anthony Housand (T.Tr. 118-190). Rather, the prosecution continued to perpetuate the error and to magnify the prejudicial effect of this

evidence by replaying the recording, while the jury again read along from the transcription thereof, during his opening argument to the jury after both sides had rested, and by repeatedly referring to the content of this tape recording during both his opening and closing arguments to the jury. In this regard, in his opening argument the prosecutor stated: (T.Tr. 1478-9) (A. 83)

> "The second thing that strikes anyone reading this indictment and certainly you have to consider the indictment, is that dynamite was used,and who had possession of dynamite? Without which this device here obviously could not have functioned. Two people. One, David Guillette, when he and John Housand burglarized Mike Lanoux's trailer in Manville, Rhode Island and took dynamite sticks and blasting caps which were then possessed by David Guillette to a place unknown. Who else? William Marrapese whose own voice you will hear in a few minutes state that he had possession of dynamite, and he is going to use it to take someone off, to kill. Who? A witness, a witness in the Brooklyn Jail."

Shortly thereafter in his opening argument to the jury the prosecutor stated: (T.Tr. 1480-1481) (A. 83-4)

> "Now, you see in front of you earphones, and I will ask you at this time to take those earphones together with the transcripts Can I ask you to take them for a minute please? When you listen to the tape recording, listen very closely because you are going to hear the voices of Daniel LaPolla, William Marrapese, and Nicholas Zinni. You are not going to hear them discuss what the Yankees did that day. You are not going to hear them discuss what new cars were bought. You are going to hear them discuss stolen M-16's and dynamiting the Brooklyn Jail."
>
> (At this time the Court, Jury Members and Counsel listened to the tape from 11:06 a.m. to 11:15 a.m.)
>
> Mr. Coffey: Twice during that conversation Daniel LaPolla refers to William Marrapese by name. 'Billy, Hey Billy, you trying to get rid of the rat population up there?' 'Yeah.' 'Who's up there? 'Oh, they got all kinds of witnesses up there.' 'We figure if the whole joint goes, we're guaranteed to get him.' 'We got eight sticks.'"

And a short time later, the prosecutor's actual concluding remarks in his opening argument to the jury were as follows: (T.Tr. 1495)

> "The sad part of it is they were so desperate, they risked the lives of not only Daniel LaPolla, but every one associated with him. 'I am going to take him off. They got all types of witnesses

We got eight sticks, I'm going to take him off.'"

And during his closing argument to the jury, the prosecuting attorney continues to refer to this tape recorded conversation: (T.Tr.1610-11) (A33)

> "In fact, when William Marrapese said 'We've got eight sticks.' 'We've got eight sticks,' these are the managerial aspects of the conspiracy, particularly William Marrapese, the managerial aspects. Not the blue collar worker, so to speak, who actually goes out and makes up the bomb."

Again in his closing argument the prosecutor refers to the tape recording (T.Tr. 1620-1621) (A. 85)

> "Now, there are many items raised by both the Government and the defense, some of which are in conflict. Perhaps the most significant one, perhaps the one with which you can weigh if it can be said this way, the credibility of the defense argument is to recall the statement by Mr. Daniels that William Marrapese's threat to blow up the Brooklyn Jail with witnesses inside of it was an idle boast. Is that an idle boast? Was it said with the same type of idle boast that he had just got through saying that he was setting $100.00 apiece for the M-16's Was that an idle boast? William Marrapese, himself, out of his own mouth without knowing that he was being recorded, without having any idea that his statements would be challenged, which removes any motivation to lie, which is important. It was said in the relative security of knowing he was saying it to whom he believed to be a friend. He admitted culpability as to Nicholas Zinni in the gun case. He stated that they had enough dynamite 'We have enough dynamite to blow up the Brooklyn Jail.' It's important because it places in his possession, an environment where there is no reason to lie. Possession of dynamite."

At T.Tr. 138, the Government offered the tapes in question against appellant Zinni and co-defendant Marrapese. The Government contending that there were two areas which are admissible "the gun conversations and the bomb conversations." (T.Tr. 95,96) The prosecutor contended that these conversations constituted prior similar acts which assuming certain tests were met would be admissible against appellant Zinni, as well as co-defendant Marrapese. If the statements of co-defendant Marrapese were something less than a "prior similar act" a fortori were the statements of appellant Zinni,

namely, "He wants to buy the rifles." and "Regular for me" not a 'prior similar act'.

To have permitted the Government to introduce evidence by way of a statement of a co-defendant and then to impute that statement to the by-standing defendant and to permit the prosecutor to comment upon it extensively is to commit the gravest of error and thereby fail to give the appellant Zinni a fair trial, however, at the very least, the Court should have given a cautionary instruction but this also the Court failed to do even though the Court said: "Wouldn't it [the tapes] show motive" (T.Tr. 138), and again: "I will tell the jury later regarding the state of this evidence, (T.Tr.189).

In addition, the following instruction was one of four concerning the tape recordings which was specifically requested by the defense to be given to the jury by the Court:

> "If you believe the Government's witnesses as to the accuracy of the voices identified and subject matter stated therein, then you must not consider the tapes as being admitted for the truth of what was said, but you may consider such testimony as tending to show a state of mind."

Instead, the Court gave only one instruction concerning the tape recording as follows: (T.Tr. 1645)

> "In connection with the tapes that have been received in evidence and which you have heard played, you must remember that unless you accept the testimony of the two Government witnesses who identified the voices, there is no other testimony identifying the voices. If you do not accept their testimony, then the tapes as evidence are worthless. And remember too what I told you about the transcripts. The transcripts are not evidence of what was said. You must rely solely on the voices that you heard and use the transcripts only as an aid in helping you to understand what you hear. In sum, if you are satisfied of the tapes reliability and trustworthiness, their fidelity and audibility, you may accept them as a recording of the conversations that took place on March 30, 1972."

The appellant Zinni respectfully contends therefore, that the prejudicial effect of this so-called 'prior act or offense' evidence made by a co-defendant tremendously outweighed its probative value, and further, that based upon the foregoing reasons as stated, the Trial Court's ruling admitting such evidence deprived the appellant Zinni of his Constitutional right to a fair trial by an impartial jury and to due process of law, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

Concerning (C) supra, the appellant Zinni respectfully contends that the manner in which the tape recorded conversation was obtained violated the Fourth, Fifth and Ninth Amendments to the United States Constitution. However, in the interest of brevity and to avoid duplicity, authorities cited and argument presented on this issue as contained in the Appellant's Brief in United States v. Marrapese, 486 F.2d 918 (2nd Cir. 1973) as incorporated herein by reference. (A.).

III. THE TRIAL COURT'S RULING DENYING CO-DEFENDANT DAVID GUILLETTE'S PRETRIAL MOTION TO SUPPRESS DEPRIVED THE APPELLANT ZINNI OF HIS CONSTITUTIONAL GUARANTEES PURSUANT TO THE FOURTH,SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Co-defendant, David Guillette, filed a pretrial motion to suppress certain evidence seized by Alcohol, Tobacco and Firearms agents from Mr. Guillette's apartment on March 20, 1973, and from his automobile on December 11, 1972. The District Court denied Mr. Guillette's motion without opinion. Since the items seized were allegedly the property of Mr. Guillette, and taken from Mr. Guillette's apartment and automobile, Mr. Guillette was selected to go forward with a pretrial Motion to Suppress. However, appellant Zinni now respectfully urges the Trial Court's denial of Mr. Guillette's pretrial Motion to Suppress as a violation of appellant Zinni's constitutional rights, and prays that this Honorable Court afford him the benefit of a favorable consideration on this issue.

(A) The prosecution's principal witness was John Anthony Housand whose presence and testimony at appellant Zinni's trial was the direct result of Mr. Housand's signed statement or so-called 'affidavit' which was illegally seized during the search of Mr. Guillette's residence, and, such testimony, therefore, should also have been suppressed as the 'Fruit of the Poisonous Tree'. Wong Sun v. United States, 371 U.S. 471 (1963) (and related cases.)

(B) Appellant Zinni respectfully alleges that he does have sufficient standing to raise this issue for consideration on appeal under authority of Jones v. United States, 362 U.S. 261; Simmons v. United States, 390 U.S. 377; Commonwealth v. Weeden (Penna.--7-1-74), 15 Cr. Rptr. 2371; People v. Martin 45 Cal 2nd 775, 290 P.2d 855; McDonald v. United States, 335 U.S.451; People v. Cahan, 44 Cal.2d 434,282 P.2d 905; People v. Smith 230 N.Y.S. 2d. 894

(1962); LaFrance v. Bohlinger, 499 F.2d 29 (1st. Cir. 1974); 38 U. of Cincinnati L. Rev. 691; 11 Duquesne L. Rev.179.

(C) Appellant Zinni respectfully urges that the 'Plain Error Doctrine' set forth in Rule 52 (b) of the Federal Rules of Criminal Procedure by considered by this Honorable Court as being applicable to his cause; this doctrine specifically stating that "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

In the interest of space and brevity and to avoid duplication with the permission of this Honorable Court, appellant Zinni hereby incorporates by reference, and as a part hereof, those arguments and authorities set forth on this identical issue as "Point VII" within the appellate brief filed with this Honorable Court on behalf of Mr. Guillette. Concisely stated, appellant Zinni alleges that the Trial Court at the hearing on Mr. Guillette's Motion to Suppress should have ruled that the Search Warrant was invalid and that the testimony of the Government's principal witness, John Anthony Housand, should have been suppressed.

(1) The affidavit upon which the search warrant was based failed to set forth sufficient facts to constitute probable cause, and

(2) Was fatally defective duc to the delay between the date of the observations made, which were the alleged basis for the application for the warrant, and the date of the actual issuance of the warrant, and

(3) Since the search warrant was invalid, the seizure from Mr. Guillette's apartment of a signed statement of John Anthony Housand, which was not contraband nor evidence of a crime, was an unlawful seizure, and, therefore, the trial testimony of prosecution witness, John Anthony Housand, being the direct result of the seizure of this signed statement, should also have been suppressed as the "Fruit of the Poison Tree" under authority of Wong Sun

v. United States, (supra) (and related cases,), and

(4) Even assuming, arguendo, that the Search Warrant was valid, the signed statement of John Anthony Housand was not described in the Search Warrant as an item to be seized, was not contraband nor evidence of a crime, and the seizure of such signed statement or affidavit was, therefore, illegal. And, as previously stated, since the trial testimony of John Anthony Housand was the direct result of the seizure of this signed statement, such testimony should also have been suppressed as the "Fruit of the Poison Tree". Wong Sun v. United States (supra), (and related cases).

Appellant Zinni would further point out that Guillette's apartment is in Providence, Rhode Island, and that the latest decision by the Supreme Court of the State of Rhode Island, State v. Tella, 321 A.2d 87 (6/12/74), is in complete accord with appellant Zinni's position as stated in paragraph (2 supra). In the Tella case the Court held that where recent information was received as to observations made within the defendant's premises some 11 months prior to the issuance of a search warrant, due to the unreasonable lapse of time there was no showing of probable cause for believing that the property , which is the object of the search, is still on the premises at the time of the issuance of the warrant, and therefore, the resulting search was unlawful. [see Tella opinion (A. 17-21)]. The Rhode Island Supreme Court commented in its opinion at page 90 thereof:

> ".....Just because those rules are relaxed, however, does not mean that inferences should be pyramided in order to find timely probable cause, particularly when the state has been unable to cite a single case wherein the time differential between the observations and the warrant has even approached 11 months."

And in footnote 5 at page 90 of the opinion, it is stated:

> "The usual dividing line between what is stale and what is timely, however, is 30 days. See Annot.100 A.L.R. 2d 525, 534-42 (1965). This was recognized in Schoeneman v. United

> States, 115 U.S. App. D.C. 110 317 F.2d 173,177 (1963) where the court noted: 'we cannot overlook the fact that the Government could cite and we could find, no case which sustained a search warrant issued more than 30 days after finding of the evidence which constituted the basis for the search.'[5]

Appellant Zinni respectfully contends, therefore, that due to the lapse of time between the alleged observations of A.T.F. Agent Weronik on May 4, 1972 and the application for and execution of the Search Warrant for Guillette's apartment on March 20, 1973, there was no probable cause to believe that the items allegedly observed on May 4, 1972, would still be there at Guillette's apartment approximately 10-11 months later on March 20, 1973, and thus the Search Warrant is invalid. [See also Sgro v. United States 287 U.S. 206 53 S.Ct. 138, 77 L.Ed. 260 (1932); United States v. Ramirez, 279 F. 2d 712, 715 (2nd Cir. 1960).

IV. THE TRIAL COURT'S ERROR IN DENYING APPELLANT'S MOTION TO DISMISS COUNT I OF THE INDICTMENT FOR LACK OF JURISDICTION DEPRIVED THE APPELLANT OF HIS GUARANTEES PURSUANT TO THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant Zinni filed a pretrial motion to dismiss Count I of the Indictment for lack of jurisdiction (R.Vol. XIII, Doc's 13) (A. 8) This motion was denied on July 31, 1973. The grounds supporting this motion were again argued before the Trial Court pursuant to appellant's motions under Federal Rules 29 (a),(b), and (c) (T.Tr. 1722-1727), said motions being denied by the Court on June 26, 1974.

The purport of appellant's argument is that the Federal Court lacks jurisdiction over alleged violations of civil rights pursuant to 18 U.S.C. 241, unless it is first alleged and then established that the violation of civil rights was 'racially motivated'.

Appellant is aware of the arguments made to the Honorable Court on this point by defense counsel in United States v. Pacelli, 491 F.2d 1108 (2nd Cir. 1974) , and on behalf of co-defendants Joost and Guillette, counsel for appellant Zinni in the interest of brevity, with permission of this Honorable Court, appellant Zinni adopts such arguments as his own for the purposes of this brief as incorporated herein by reference.

Appellant also respectfully refers this Honorable Court to a series of quotations concerning the legislative purpose of 18 U.S.C. 241 which were not included in the aforementioned arguments. These quotations, appearing in the Congressional Record, are of statements made, during a six week debate over the provisions of the bill, by Senators Sam Ervin and Philip Hart.(A.24)

Appellant would also refer to the dissenting opinion in Anderson v. United States, 94 S.Ct. 2253 (1974) wherein Mr. Justice Douglas stated on

page 2269 thereof:

> "The argument ignores the intent of Congress as manifested by the legislative history of Section 241,Congress did not intend to reach local election malfeasance where there was no evidence of racial bias because it did not believe it had the power. It expressed unwillingness to interfere with the right of the States... where there was no racial descrimination."

Appellant would further urge that the assumption of jurisdiction by the Trial Court under 18 U.S.C. 241 was arbitrary and capricious having no reasonable connection with the purpose of the statute as promulgated by Congress and as reflected in their debates, and was, therefore, contrary to the appellant's rights under the Fifth Amendment and other applicable provisions of the United States Constitution. That is, unless the "racially motivated' criteria is applied to 18 U.S.C. 241, there is no reasonable criteria under which a prosecution can be guided in order to make a determination whether to proceed on a particular matter under this statute. It is mere common knowledge that throughout the United States each year there are a number of conspiracies to murder, conspiracies to break and enter, conspiracies to commit robbery, etc. Without such a workable criteria, the Government's assumption of jurisdiction over one conspiracy rather than another is merely an arbitrary selection left to the whim of the prosecution and is thus violative of Yick Wo v. Hopkins, 118 U.S. 356 [See also United States v. Robinson, 311 F.Supp. 1063 (1969 Mo.)]. To hold otherwise, appellant respectfully contends, would be to permit the power of the Federal Government to be arbitrarily and selectively enforced against whichever person the Government chooses to prosecute federally for an offense already punishable by a State statute, while choosing not to prosecute federally another individual for the same identical offense, thus amounting to a discriminatory enforcement of a Federal statute.

V. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION (A) TO DISMISS THE INDICTMENT ON THE GROUND THAT APPELLANT WAS INDICTED BY A BIASED GRAND JURY AND (B) TO CONDUCT A VOIR DIRE EXAMINATION OF EACH GRAND JUROR AS TO ANY BIAS OR PREJUDICE AGAINST THE APPELLANT AND HIS CO-DEFENDANTS.

Appellant and co-defendants Joost, Guillette, and Marrapese moved pretrial to dismiss the instant indictment returned against them on June 13, 1972 on the ground that they had been indicted by a biased Grand Jury. The basic thrust of their Motion to Dismiss was that the Grand Jurors who indicted them on the instant charges involving the death of Daniel LaPolla were the very same Grand Jury members before whom Daniel LaPolla had previously testified in person, which testimony resulted in the previous indictment of the appellant and his co-defendants on the charges concerning the theft of the thirty M-16 automatic rifles. Their contention, therefore, is that, human frailties being what they are, these Grand Jury members may very well have not been acting fairly and impartially, either consciously or sub-consciously when evaluating the evidence which resulted in the instant indictment. In dismissing the motions the Trial Court, however, did acknowledge that the better procedure would have been to have separate Grand Juries in the two cases.

The motion was again reargued by defense counsel following conviction on the instant charges, at the hearing on his Motion for a New Trial just prior to sentencing on June 26, 1974 (T.Tr. 1748)

The Appellant's Brief for co-defendants Joost and Guillette which has already been filed in this Honorable Court, (oral argument having already been given by counsel thereon), contains this precise "Question Presented" as "Point XIII" thereof, complete with authorities cited therein and argument in support thereof. In the interest of brevity and to avoid duplicity, with permission of this Honorable Court, appellant Zinni hereby adopts the content of "Point XIII" as incorporated herein in its entirety.

VI. THE TRIAL COURT'S RULING HOLDING INADMISSIBLE A HEARSAY DECLARATION BY ANTHONY SOUCA THAT HE KILLED DANIEL LAPOLLA DENIED APPELLANT ZINNI A FAIR TRIAL GUARANTEED BY THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

On June 29, 1973, appellant Zinni filed a motion to be furnished with evidence favorable to the accused (R.Vol. XIII,Doc. 80). On August 6, 1973, the Government agreed to provide such information, provided the obligation was limited to the request of Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963), and it was mutually agreed and ordered by the Trial Court. The Government's action in failing to pursue the Souca allegation effectively denied the defense this valuable piece of exculpatory information. In the interest of brevity, the appellant Zinni respectfully requests permission to adopt and incorporate as his own the arguments and authorities cited by co-defendants Guillette and Joost in their brief and their oral arguments before this Honorable Court.

VII. THE TRIAL COURT'S DENIAL OF APPELLANT ZINNI'S MOTION FOR SEVERANCE UNDER RULE 14 SO PREJUDICED THE TRIAL THAT IT DENIED THE APPELLANT A FAIR TRIAL GUARANTEED UNDER THE FIFTH AND SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Trial Court's denial of appellant Zinni's Motion For Severance constituted an abuse of discretion that denied appellant Zinni his fundamental right to a fair trial. The Trial Court should have granted appellant Zinni's Motion For Severance for the following reasons:

(A) The Trial Court erred in not granting the appellant's Motion For Severance in order to prevent the prejudice and confusion caused by the production of evidence on two separate conspiracies directly in variance with the single conspiracy charged in Count I of the indictment.

(B) The Trial Court erred in not granting the appellant's Motion For Severance because of the development during the trial of conflicting and antagonistic defenses.

(C) The Trial Court erred in not granting the appellant's Motion For Severance in order to prevent the spill over of the possible guilt of co-defendant Marrapese caused by the production of highly prejudicial and inflammatory evidence by both the Government and co-defendant Marrapese which was inadmissible against the appellant Zinni.

(D) The Trial Court erred in not granting the appellant's Motion For Severance on the grounds that if granted separate trials co-defendant Marrapese would give valuable exculpatory evidence about the appellant which he would refuse to give in the joint trial.

Concerning (A) above, the appellant Zinni respectfully contends, that throughout the long history of the case it has been the contention of appellant Zinni that evidence that would be produced and was produced by the Govern-

ment would be in variance with the indictment. Count I of the indictment (A.) alleges that "David Guillette, Robert Joost, William Marrapese, and Nicholas D.Zinni did conspire to injure, oppress, threaten and intimidate one Daniel LaPolla in the free exercise and enjoyment of a right and privilege secured to him by the constitution and laws of the United States...THAT THIS COMBINATION AND CONSPIRACY RESULTED IN THE DEATH OF DANIEL LAPOLLA." It is clear from reading the indictment that the Government had alleged a conspiracy resulting in the bombing death of Daniel LaPolla. The Government in its opening statements told the jury that they were alleging a single conspiracy resulting in the death of DanielLaPolla. As the Government unfolded its case it became evident that it was producing evidence on not a single conspiracy but actually on at least two separate conspiracies. The first alleged conspiracy will be called the "Housand Conspiracy". It was developed by a witness named JOHN ANTHONY HOUSAND. Disregarding the arguments in other parts of this brief, ABOUT THE INCONSISTENCIES IN HIS TESTIMONY, HIS BACKGROUND IN CRIMES OF FRAUD AND THE MASS OF EVIDENCE PROVING THE IMPOSSIBILITY OF A MAY 8, 1972, CONSPIRATORIAL MEETING IN THE BACK ROOM OF CARTER'S JEWELRY STORE, the Government produced the following evidence on the "HOUSAND CONSPIRACY."

On April 18, 1972, John Housand entered the state of Rhode Island to take part in a stolen American Express Money Order cashing scheme (T.Tr.291) which ended abruptly with the arrest of his partner, John Daniels (T.Tr. 292). On April 21, 1972, he was introduced to David Guillette and Robert Joost (T.Tr.295) On April 24, 1972, Housand and Guillette drove down to Carter's Jewelry Store and was introduced to Nicholas Zinni (T.Tr.299). On April 27, 1972, Housand and Guillette burglarized a trailer owned by Laneaux (T.Tr.302). On the way back they were arrested by the Lincoln Police for possession of burglary tools (T.Tr.304). The next day Housand and Guillette returned to Carter's Jewelry

Store and talked to Zinni in the back room. (T.Tr. 304-307)

On May 4, 1972, David Guillette, Robert Joost, William Marrapese and Nicholas Zinni were arrested on charges of stealing thirty M-16 automatic rifles (the'gun case'). They were taken to Hartford, Connecticut for presentment before the Magistrate. Housand followed them with his girlfriend,Mrs. Cochran, Mrs. Guillette and Joost's girlfriend, Miss Luzen. In Hartford after stopping at the Federal Building, they attended the movie "What's Up Doc?" (T. Tr. 321). Around 3:30 to 4:00 p.m. they returned to the Federal Building to pick up Joost and Guillette (T.Tr. 324). During the return trip Guillette stated that Bucci said that LaPolla was the only witness (T.Tr. 325). Later they stopped at a restaurant called the P & M in Plainfield, Connecticut. (T.Tr. 327). Upon entering the restaurant, the women immediately left for the restroom and stayed there 10 to 15 minutes (T.Tr. 328). During this time either Joost or Guillette asked Housand if he would kill LaPolla and how much would it cost (T.Tr. 328). Housand said he would but it would cost $5,000.00 and that they would have to locate LaPolla for him (T.Tr. 329).

On May 8, 1972, Housand arrived at David Guillette's house around 9:00 a.m. (T.Tr.335). They left around 9:30 to 10:00 a.m. to go to Carter's Jewelry Store,(T.Tr. 335) and arrived there around 10:00 a.m. They walked through the front door and proceeded to the backroom of Carter's Jewelry Store. In the room already present were William Marrapese, Nicholas Zinni, Robert Joost, and Attorney Andrew Bucci (T.Tr.338). David Guillette told everyone there "as we previously discussed, John here has agreed to take care of the LaPolla thing for us for five thousand dollars." (T.Tr.340) Guillette further stated that Housand would probably be the best choice for this because no one knew Housand in the New England area and after he was finished, Housand could leave the area with

little or no problem (T.Tr. 341). Guillette then asked "does this seem like a fair price?" (T.Tr.341) Marrapese stated that it seemed like a fair price with him especially if it were split four ways (T.Tr.342). Zinni said "it sounded all right to him." (T.Tr.342). Marrapese then said "this guy's gotta go... with all my troubles that I have going currently with the Government...this would be the crowning blow." (T.Tr.342-343). After the meeting, on the return trip Housand asked Guillette for a clean gun (T.Tr. 344). That night Housand and Guillette went to Woonsocket, Rhode Island and met Sitko. Sitko handed Guillette, and Guillette handed to Housand a Colt .32 automatic revolver which Housand was to use to kill LaPolla (T.Tr.347). On May 24, 1972, there was a falling out between Housand and Guillette. Housand was severly beaten on that day by Mrs. Cochran's husband while Joost and Guillette watched. On June 13, 1972, Housand left Rhode Island. He was subsequently arrested and at the time of the bombing, on September 29, 1972, John Anthony Housand was incarcerated in North Carolina. (T.Tr.348). With Housand's departure from the state of Rhode Island, the "Housand Conspiracy" terminated without the death of Daniel LaPolla.

Also, during the trial, the Government produced evidence on what will be called the "SECOND CONSPIRACY". Disregarding Argument I, the evidence about the second conspiracy was many loosely associated acts by Marrapese, Joost, Guillette, and several minor figures. Not once during the proof of this second conspiracy did the Government mention, place, or even associate appellant Zinni with any of these activities:

(a) In May of 1972, co-defendant Marrapese and George Hennebury went down to Oneco, Connecticut in co-defendant Marrapese's car in an attempt to locate Daniel LaPolla in order to retrieve some jewelry that Daniel LaPolla had that

belonged to co-defendant Marrapese. They stopped at a post office and after co-defendant Marrapese identified himself, the post office employee gave him Daniel LaPolla's address. (T.Tr. 569-570). They drove to the house, but no one was home. (T.Tr.571) Co-defendant Marrapese also asked at a nearby gas station where he might find LaPolla, but did not learn of his whereabouts. (T.Tr.591-2).

(b) On July 29, 1972, co-defendant Marrapese contacted Mrs. Ann Kity, Daniel LaPolla's sister, about the whereabouts of Daniel LaPolla. Mrs. Kity said she didn't know where to find him and co-defendant Marrapese responded that if he had to he would subpoena her, her other brother, Reverend LaPolla, and her sister Nancy to testify for him in the "gun case" (T.Tr. 630-650)

(c) Attorney Bucci testified that during the summer of 1972, he and co-defendant Marrapese drove to Oneco, Connecticut in co-defendant Marrapese's car, trying to locate Daniel LaPolla. They visited a gas station (T.Tr.1259) near Daniel LaPolla's house without locating him.(T.Tr.1261) They visited a stone quarry where the M-16 rifles were allegedly stored,(T.Tr. 1260) and then returned to Providence, Rhode Island.

(d) Attorney Bucci hired a private investigator named Robert Joyal. Mr. Joyal testified that from July 29, 1972 through August 6, 1972, he kept Daniel LaPolla's home under surveillance, without ever observing Daniel LaPolla. (T.Tr. 929-957).

(e) Near the end of July, co-defendant Marrapese contacted Alfred Marafino, the husband of Daniel LaPolla's former wife, about locating LaPolla. Mr. Marafino told him that he didn't want to get involved and co-defendant Marrapese allegedly stated that he could make it hard for Mrs. Marafino and her son (T. Tr. 604). They were interviewed shortly thereafter at a law office by Mr. Bucci law associate, attorney John O'Neill and another attorney in this regard, and they gave some information concerning Daniel LaPolla. (T.Tr. 607)

A third alternative would have been for the Court to sever the appellant

(f) On September 7, 1972, two Federal Agents observed a vehicle registered to co-defendant Marrapese's wife in the Oneco, Connecticut area. (T.Tr.655) The agents were unable to intercept the car or identify the driver.(T.Tr.667-668).

(g) On September 22, and 23, 1972, co-defendants Joost and Guillette hired a plane and pilot; they used their own names and co-defendant Guillette knew the pilot. (T.Tr.821) They told the pilot that they wanted to serve a man with some legal papers. (T.Tr. 793). Guillette and the pilot flew over Oneco, Connecticut while Joost stayed on the ground communicating with them by walkie-talkie radio. (T.Tr.797). They did not locate Daniel LaPolla on September 22, 1972, but on September 23, 1972, Joost radioed the plane that LaPolla had seen him and LaPolla had left the area. (T.Tr.815). Within one week after the bombing in Oneco, Connecticut, Guillette telephoned the pilot and requested that if he was asked about the flight not to say anything about it. (T.Tr. 818-819).

(h) Following the death by natural causes by Reverend LaPolla, a wake was held for him at a church in Providence, Rhode Island on September 25, 1972 (T.Tr.153) Among the mourners in attendance were co-defendant Marrapese's mother, grandmother, and aunt, who are distantly related to the LaPolla family (T.Tr.920). On this evening Attorney Bucci and co-defendant Marrapese tried to gain admission to the wake in order to interview Daniel LaPolla (T.Tr.1265-66). After a discussion with Federal Agents blocking their entry, Attorney Bucci was allowed to enter but did not see Daniel LaPolla. (T.Tr.266) The following day September 26, 1972, Attorney O'Neill and co-defendant Marrapese entered the church and signed their true names in the guest register at the church. (T.Tr. 640). On the morning of September 27, 1972, co-defendants Joost and Guillette were observed near the interment services.

context of the entire proceedings, Cupp v. Naughten 414 U.S. 141, 94 S.Ct. 396

(i) On that same day, Attorney O'Neill, co-defendant Marrapese and a law office secretary, Mrs. Melaela Valletta, went to the Oneco, Connecticut area to try to interview Daniel LaPolla. Attorney O'Neill asked at a local gas station about the whereabouts of Daniel LaPolla and left his business card. (T.Tr.975). Unable to locate LaPolla, they traveled to a stone quarry where they identified themselves to several people and asked questions about Daniel LaPolla (T.Tr. 977-979). They then traveled to the Norwich Bulletin office in Norwich , Connecticut to look at articles pertaining to the theft of the M-16 rifles (T.Tr.980) and then purchased a bicycle for co-defendant Marrapese's daughter's birthday. (T.Tr. 983-984)

(j) On September 29, 1972, Daniel LaPolla was killed by an explosion at his home in Oneco, Connecticut.

(k) On the evening of September 29, 1972, George Hennebury went to co-defendant Marrapese's home and he and co-defendant Marrapese traveled to the Colonial Hilton Motel in Providence, Rhode Island (T.Tr. 594) which co-defendant Marrapese and Mr. Hennebury frequented practically every Friday night (T.Tr. 595). Mr. Hennebury registered for a room in his own name. (T.Tr. 596). Later he was joined in the cocktail lounge by co-defendant Marrapese and later by Attorneys Bucci and Coia. (T.Tr. 575). It was decided that co-defendant Marrapese would stay at the motel that evening in Mr. Hennebury's room until Attorney Bucci could determine why Federal Agents were parked around co-defendant Marrapese's house (T.Tr. 578). The following evening Mr. Hennebury was again at the Colonial Hilton cocktail lounge with co-defendant Marrapese and co-defendants Joost and Guillette (T.Tr. 600)

Appellant Zinni respectfully contends that because the Government's proof did show at least two conspiracies, one of which was the "Housand Conspiracy" not resulting in the death of Daniel LaPolla and the "Second

Conspiracy" which the Government claims did result in the death of Daniel LaPolla, the Trial Court should have severed the trials. The United States Supreme Court in Kotteakos v. United States 328,U.S.750, 68 S.Ct. 1239, 90 L. Ed. 1557 (1946) faced a similar issue. In Kotteakos several individuals were indicted in a single conspiracy count to violate the provision of the National Housing Act. The link between the individuals was a common co-defendant and intent to defraud the Government. Proof that developed during trials clearly showed several conspiracies. The court said that:

> "It's not whether there has been a variance in the proof, but whether there has been a variance as to affect the substantive rights of the accused. 295 U.S. at page 82, 55 S.Ct. page 630. United States v.Agueci, 310 F.2d 817, 99 ALR 2d 478 (1962),cert. denied 372 U.S. 959, 10 L.Ed. 2d 11, 83 S.Ct. 1013,Cert. Denied 372 U.S. 959 10 L.Ed. 2d 12, 83 S.Ct. 1016.

In the instant case it is clear that the confusion and prejudice of this variance in proof denied appellant Zinni a fair trial and clearly it cannot be claimed harmless error. In Kotteakos v. United States (supra)the Court reiterated the harmless error rule:

> "Judgment shall stand notwithstanding even where the court is sure that the error did not influence the jury or had but a very slight effect, but if the court cannot say with fair assurance that the judgment was not substantially swayed by the error, then the judgment must be reversed."

Appellant Zinni respectfully contends that the jury was clearly swayed by this error which had the effect of so prejudicing, appellant Zinni that he was drawn into a conspiracy which the Government's proof shows no involvement on his part. The Government during its opening statment told the jury that it would prove a conspiracy, composed of David Guillette, Robert Joost, William Marrapese, and Nicholas Zinni, to kill Daniel LaPolla by bombing. The only direct or indirect proof of appellant Zinni's involvement with any conspiracy is limited to one alleged statement (T.Tr. 341) in regard to hiring Housand.

There is no other direct or circumstantial evidence at all in the trial of any involvement of appellant Zinni with any conspiracy to kill Daniel LaPolla, other than the very specific, but also highly dubious, "Housand Conspiracy" Guilt by association or as in the instant case former association is foreign to our legal system. Kruluvich v. United States, 336 U.S. 440 , 69 S.Ct. 716 93, L.Ed. 790, (1949)

During the closing arguments, the Government reiterated their contention that there was a single conspiracy composed of the four co-defendants which resulted in the death of Daniel LaPolla by bombing. In the Trial Judge's charge to the jury he listed the 5 elements in Count I of the indictment. The fifth element was the following:

> "AND FIFTH, THAT AS A RESULT OF PARTICIPATING IN THIS CONSPIRACY , THE DEFENDANT CAUSED THE DEATH OF THE VICTIM DANIEL LAPOLLA." (T.Tr. 1635) (Emphasis added)

The Trial Judge later in his charge backstepped and the appellant Zinni respectfully contends added to the confusion and prejudice created by the proof of several conspiracies. The Judge instructed the jury that they could find the defendants guilty of a conspiracy not resulting in the death of Daniel LaPolla, (T.Tr. 1639), which is in direct conflict with the Judge's detailed analysis of Count I (T.Tr. 1635-1639), the indictment containing only a conspiracy resulting in the death of Daniel LaPolla and the Government's opening and closing statements claiming proof of a conspiracy resulting in Daniel LaPolla's death. The verdict sheet (A.) which the Trial Judge prepared and gave to the jury clearly outlined two conspiracies; one conspiracy resulting in death and another not resulting in death. Appellant Zinni respectfully argues that the verdict sheet was the perfect vehicle for the jury to speculate and thus deny him a fair trial. On June 11, 1974, the jury asked a question which clearly showed that their deliberation was confused and tainted

by the variance in proof. (T.Tr. 1680):

> "Question--Is it possible to find one defendant guilty of conspiracy resulting in death and the other guilty of conspiracy not resulting in death?"

The Trial Judge answered "Yes, T.F.M." (T.Tr. 1681). It is clear that the jury was speculating on one conspiracy that wasn't in the indictment and not part of the claimed proof of the Government. On June 12, 1974, the jury asked a question (T.Tr. 1684):

> "Question--Is it possible under the definition of conspiracy for one conspirator once a conspiracy has been formed to cease to be a member of that conspiracy without a new conspiracy being formed?"

Appellant Zinni respectfully contends that this question clearly shows the prejudice that the variance in proof and the Judge's recognition of the variance in his charge, verdict sheet submitted to the jury and his answer to the previous question. The jury was speculating on an issue not involved in the trial. The Trial Judge's answer must have added to the jury confusion and especially, the last part where he said: (T.Tr. 1699)

> "I CHARGE YOU THAT THERE WAS NO EVIDENCE IN THE CASE OF ANY NEW CONSPIRACY BEING FORMED, ASSUMING THAT YOU FIND A CONSPIRACY WAS FORMED PREVIOUSLY."

The answer cannot possibly be reconciled with his previous answer where he told the jury that it was possible to find two separate conspiracies from the evidence This particular jury question will be discussed in length in appellant's Argument VIII of this brief. The court should have severed appellant Zinni's trial from co-defendant Marrapese's as requested by appellant Zinni because of prejudice and confusion created by the Government and Trial Court which caused the jury to speculate about multiple conspiracies. At 2:12 p.m. on June 12, 1974, the jury returned a guilty verdict on all counts against appellant Zinni. Appellant Zinni respectfully contends that the combination of the foregoing facts affectively denied appellant Zinni his constitutional right to a fair trial.

It was the same type of situation that Justice Jackson outlined in his concurring opinion in Kruluvich v. United States supra. The jury transferred guilt from one defendant to another defendant and found the appellant Zinni guilty of the conspiracy charged even though he was only associated with the other co-defendants through American Gold Buyers, and there was no evidence on any of his activities other than the May 8, 1972 "Housand Conspiracy" meeting.

Appellant Zinni respectfully contends that the Government's proof cannot be classified as a chain conspiracy where there is an ongoing scheme. United States v. Borelli 336 F.2d 376 (2nd Cir. 1964) ; United States v. Capra 501 F. 2d 267, (2nd Cir. 1974). The appellant's only appearance in the case other than a couple of irrelevant times preceeding the conspiracy was the alleged May 8, 1972 10:00 a.m. meeting where the only agreement was to have Housand shoot Daniel LaPolla for $5,000.00 which would be split 4 ways. United States v. DeNoia, 451 F.2d 929 (2nd Cir. 1971).

Appellant Zinni respectfully contends that the Trial Court had no choice but to grant a severance to prevent the denial of a fair trial. The Court in United States v. Butler 494 F.2d 1246 (10th Cir. 1974) states:

> "When joinder of either defendants or offenses causes a threatened deprivation of a fair trial, severance is no longer discretionary."

Appellant Zinni respectfully contends that this Trial Court's denial of his Motion for Severance on the grounds of variance in proof from the indictment by the Government so prejudiced, confused, and tainted his trial that the conviction must be reversed. Kotteakos v. United States (supra); United States v. Cross 329 F.2d 180 (4th Cir. 1964); United States v. Varelli, 407 F.2d 735 (7th Cir. 1969); United States v. Butler (supra)

Concerning (B) above, the appellant Zinni respectfully contends, that at the rehearing on the pretrial Motion for Severance before Judge Glairie,

appellant Zinni requested a severance from the joint Marrapese-Zinni trial to prevent the prejudice that might be created by conflicting and antagonistic defenses. The motion was denied with the right to raise it again during the trial. As previously stated in the brief, the Government developed evidence during the trial on at least two conspiracies which was in variance with the single conspiracy alleged in Count I of the indictment. As for the case defense developed, it became evident that this variance in proof required different and conflicting defenses for the co-defendants.

Appellant Zinni as shown in this brief, was only allegedly involved in the "Housand Conspiracy" of May 8, 1972. THE ENTIRE DIRECT OR CIRCUMSTANTIAL EVIDENCE RELATED DIRECTLY OR INDIRECTLY TO APPELLANT ZINNI'S INVOLVEMENT IN ANY ALLEGED CONSPIRATORIAL MEETING WAS LIMITED TO EIGHT WORDS:

(Witness Housand)
"Mr. Zinni said it sounded alright to him." (T.Tr.342,line 12)

The entire direct, indirect, circumstantial, or any type of evidence involving appellant Zinni with the spillover of the "Housand Conspiracy", the "Second Conspiracy" or any involvement in the crimes alleged in Count II and Count III of the indictment, amounted to Zero lines. Because the Government's witness John Anthony Housand, placed the appellant at the May 8, 1972,10:00 a.m. conspiracy meeting, the appellant's defense was simply an 'alibi' defense. The appellant produced several witnesses including a Judge, a State Senator, several policemen and several attorneys who testified about the impossibility of a May 8, 1972,10:00 a.m. meeting , because appellant Zinni, co-defendant Marrapese and Attorney Bucci were in the Providence Superior Court at the same time as Mr. Housand alleges that the conspiratorial meeting was taking place several miles away in Cranston, Rhode Island.

Co-defendant Marrapese had a different burden of proof as (A) above shows, the Government after producing evidence on the "Housand Conspiracy"

developed the "second conspiracy" by producing testimony on the various activities of co-defendants Marrapese, Joost and Guillette, and several minor characters in their efforts in seeking an interview with Daniel LaPolla. Never during this part of the trial did the Government show any knowledge or involvement on the part of the appellant with any of these activities. Co-defendant Marrapese was faced with explaining many innocent independant acts which viewed in their totality could appear incriminating. Co-defendant Marrapese had a two part defense. As to the "Housand Conspiracy" he raised the same 'alibi' defense as the appellant, but as to the "second conspiracy" he developed the defense that the alleged activities were only innocent activities of men (Marrapese, Joost, and Guillette) trying to locate and interview a witness. Co-defendant Marrapese cross examined witnesses produced by the Government in such a manner as to elicit even more highly inflammatory evidence about his, Joost's and Guillette's activities. The co-defendant called witnesses who in great detail described co-defendant Marrapese's, Joost's and Guillette's activities in searching out LaPolla, some of which were not even produced by the Government.

Appellant Zinni on the 5th day of trial made an oral Motion for Severance on the grounds of conflicting defenses. He pointed out the grave danger of co-defendant Marrapese's defense of bringing out every facet of his activities , that it would so prejudice the trial that there would be a spilling over of guilt onto the appellant Zinni(T.Tr.1059) A jury could interpret the activities of co-defendants Marrapese, Joost and Guillette in an incriminating light...the motion was denied.

It is true that mere conflict among the defendants or the mere possibility of conflicting and antagonistic defenses is generally not enough for severance from a joint trial United States v. Abrams 29 FRD 178 (S.D.N.Y. 1961). Nevertheless, a single joint trial, however, desirable from the view

of efficient and expedient criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial. United States v. Kahaner 203 F.Supp. 78,80-81 (S.D.N.Y. 1962). Every man has the right to raise his own defense but the courts will not allow a joint trial to continue where the defense of the co-defendant is so highly prejudicial and inflammatory that it denys the other co-defendant a fair trial because of the spill over of guilt. United States v. Butler, (supra)

It should be added that if the court had granted a severance of appellant Zinni's trial, thus preventing the denial of his right to a fair trial, the separate trial using the transcript as a guide would be very short. Because no severance was granted to avoid the denial of a fair trial, appellant Zinni should be granted a new trial.

Concerning (C) above, the appellant Zinni respectfully contends, that as has been stated several times in this brief, the Government developed proof on at least two separate conspiracies instead of the one conspiracy alleged in Count I of the indictment. This situation caused co-defendant Marrapese to develop a defense that required him to elicit from Government witnesses highly inflammatory evidence about his activities in seeking an interview with Daniel LaPolla. Co-defendant Marrapese also called several witness who gave more highly inflammatory testimony. Appellant Zinni during trial objected to it as being irrelevant against the appellant and the grave danger that the admission of this highly inflammatory and inadmissible evidence against the appellant would cause a transfer of guilt.

The Government offered into evidence a tape recording of the alleged conversation between Zinni, Marrapese, and LaPolla. Disregarding the arguments in Argument II of this brief, even if the tapes were relevant to co-defendant Marrapese's state of mind, they were still irrelevant andthus inadmissible

against the appellant.

As has been stated previously, the only direct or indirect testimony on the appellant's activities in the conspiracy or the commission of Count II and Count III amounted to eight words. In United States v. Bronker 395 F. 2d 881 (2nd Cir. 1968), this Honorable Court was faced with a similar situation. Several Internal Revenue Service agents and taxpayers were indicted on eighty counts charging violation of six criminal statutes relating to filing and processing of federal returns and a conspiracy count which was subsequently dropped. The Court ordered a new trial:

> " This kind of prejudice is particularly injurious to the defendants who are charged in only a few of the many counts, who are involved in only a small proportion of the evidence and who are linked with only one or two of the defendants. The jury is subject to weeks of trial dealing with dozens of incidents of criminal misconduct which do not involve these defendants in any way. As trial days go by, the'mounting of the guilt of one is likely to affect another.'" Schaffer v. United States 362 U.S. 511, 523, 80 S.Ct. 945,952 (1960) Douglas,J. dissenting. Bronker,(supra) at page 888

Only eight words of evidence linked the appellant with any alleged conspiracy to shoot Daniel LaPolla whereas, the Government produced hundreds of pages of testimony on the various activities of co-defendants Joost, Guillette, and Marrapese.

Appellant Zinni respectfully contends that this was a spilling over of guilt from co-defendant Marrapese to the appellant, caused by the admission of this highly inflammatory evidence which would, at a separate trial, be inadmissible. For the reasons above the appellant should be granted a new trial.

Concerning (D) above, the appellant Zinni respectfully contends, that on January 11, 1974, appellant Zinni filed a Motion for Severance. (A. 22). During the rehearing of the motion on May 6, 1974, (A.98-126) the Court mentioned the fact that co-defendant Marrapese had given exculpatory testimony in

his September 10-11, 1973 statement given to the Government and appellant Zinni argued that he needed the severance in order to have co-defendant Marrapese testify about the scope of appellant Zinni's employment and activities. The motion was denied by Judge Clairie, who was the Trial Judge for co-defendants Joost and Guillette's trial on the same indictment and also, the Trial Judge for the "gun trial" in which co-defendant Marrapese had given exculpatory evidence about appellant Zinni. On the fifth day of trial before Judge Murphy on June 5, 1974, appellant Zinni reraised the motion. Co-defendant Marrapese had begun to develop a defense that was antagonistic with the appellant's defense and it became imperative that appellant Zinni get the valuable testimony of co-defendant Marrapese. The only way that co-defendant Marrapese would testify would be at a separate trial, because co-defendant Marrapese would raise his Fifth Amendment privilege. The motion was denied and appellant Zinni was denied his constitutional right to a fair trial.

Where one co-defendant will take the stand and inculpate another co-defendant the courts will grant severance under Rule 14 of the Federal Rules of Criminal Procedure. Bruton v. United States 391 U.S. 123,88 S.Ct. 1620,20 L.Ed. 2d 476 (1968); United States v. Magnati 51 F.R.D. 3 (D.C. Conn 1970) . A more difficult situation under Rule 14 which is present in this case, is where one co-defendant is prevented from calling the other co-defendant as a witness to give exculpatory information because that co-defendant will raise his Fifth Amendment privilege not to testify. This situation creates a direct conflict between one co-defendant's Sixth Amendment rights to call witnesses and the other's Fifth Amendment privilege against requiring incriminating testimony. Courts have been weary of this claim and have refused to grant a severance where this claim is merely unsubstantial. United States v. Ontega 471 F.2d 1350

(2nd Cir. 1972) or where in fact, the testimony proffered in a pretrial hearing was not exculpatory. United States v. Ellsworth 481 F.2d 864 (9th Cir. 1973). The Courts have held that severance will be granted where there is a claim showing that the other co-defendant would give exculpatory evidence at a separate trial. United States v. Martinez 486 F. 2d 15 (5th Cir. 1973)

It makes no difference that appellant Zinni did not call co-defendant Marrapese to the stand because of the two fundamental protections afforded by the Fifth Amendment right against self-incrimination:

> "By its first and most familiar protection this Fifth Amendment provision gives any person the right to refuse to answer questions which might tend to incriminate him. But equally important is the 'universally held' interpretation of this right prohibiting any person who is on trial for a crime from being called to the witness stand. 8 Wigmore on Evidence 406 (Claim of Privilege S 2262); McCormick on Evidence 257-259 (Self-incrimination S 124) (1954). The second protection applies without regard to the nature of the intended inquiry; that is a defendant on trial cannot be required to take the stand to answer even the most innocuous, nonincriminating inquiries. Nor does it make a difference whether the defendant is called to the stand by the prosecution or a co-defendant. 8 Wigmore on Evidence 410 (Claim of Privilege S2268) United States v. Ecviles 352 F. 2d 892,897 (7th Cir. 1965)

The Court in United States v. Ecviles (supra) found that Ecviles was prejudiced by not being able to call a co-defendant who on three previous occasions had given valuable exculpatory testimony about Ecviles. Appellant Zinni respectfully contends that the exact situation existed in the instant case. Co-defendant Marrapese during the "gun case" had given exculpatory testimony about appellant Zinni. Co-defendant Marrapese also gave a statement to the Government that totally exculpated the appellant Zinni from any involvement with the bombing of Daniel LaPo-la. By being tried together appellant Zinni was denied this valuable exculpatory testimony. The Court should have granted his Motion for Severance to prevent the denial of a fair trial that resulted when the appellant could not get the valuable exculpatory testimony of co-defendant Marrapese before the jury.

VIII. THE TRIAL COURT'S ANSWER AND SUPPLEMENTAL CHARGE TO THE JURY IN RESPONSE TO THE JUNE 12, 1974, JURY QUESTION ON WITHDRAWAL, SO PREJUDICED, CONFUSED, AND TAINTED THE JURY'S DELIBERATION THAT IT WAS A DENIAL OF THE DUE PROCESS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

On June 12, 1974, during the jury deliberation, the jury submitted the following request and question:

> "Please reread that portion of your charge where you give the legal definition of conspiracy.' and then beneath that paragraph, 'Question: is it possible under that definition of conspiracy for one conspirator once a conspiracy has been formed to cease to be a member of that conspiracy without a new conspiracy being formed.'" (T.Tr. 1688)

After a long discussion during which defense counsel contended that the jury was speculating on an issue not involved, raised, or even mentioned during the case and appellant Zinni indicated that if an answer had to be given the only way to answer the question would be with a simple "YES" (T.Tr.1699); the Trial Court refused to follow appellant Zinni's suggestion and the appellant took exception to the entire answer and charge. (T.Tr. 1705). The Trial Court called the jury back, reread the part of his charge on conspiracy (T.Tr.1701), and then quoted from United States v. Borelli 336, F.2d 376 (2nd Cir. 1964) (T.Tr. 1703), in which this Honorable Court had to decide whether the defendant had withdrawn from the conspiracy. Borelli had raised the issue of withdrawal and the running of the statute of limitations during the trial. This Court citing Justice McKenna's test of withdrawal in Hyde v. United States 225 U.S.347,366 32 S.Ct. 793 , 803, 56 L.Ed. 1114 (1912), found that Borelli had not met his burden of proving withdrawal other than mere non-activity. Appellant Zinni respectfully contends that with the reading of Justice McKenna's test for withdrawal, he was denied a fair trial.

It has always been both appellant Zinni's and co-defendant Marrapese's defense that there was never a May 8, 1972 conspiratorial meeting. Not once

during the trial was even an inference raised by either defendant that he had been part of a conspiracy to kill Daniel LaPolla and had made an effort to withdraw before the September 29, 1972 bombing. It is clear from looking at the entire record that the admissions of highly prejudicial and inadmissible evidence, the complexity of the case, the Government's attempt to prove multiple conspiracies and the Trial Court's contradictory and confusing charge, verdict sheet, and answer to the preceeding question had caused the jury to speculate on issues not raised during the trial. The Trial Court's answer to the question placed the impossible burden on the appellant of clarifying his defense and/or meeting the burden of proving withdrawal after the case had gone to the jury It is clear from the question that the jury believed that withdrawal was a key issue in the trial and the Trial Court's answer enhanced this misconception.

There were three ways of handling the question:

(1) The Trial Court could have followed appellant Zinni's suggestion of simply answering the question with "Yes" (T.Tr. 1699). This would be a factual answer to the question without adding the confusion that must have resulted with the Trial Court's actual answer.

(2) A second solution to this problem was for the Trial Court to refuse to answer the question. Salzman v. United States, 405 F.2d 358, 131 U.S. App.D.C. 393 (D.C. Cir. 1968). On June 11, 1974, the Trial Court during discussion on the first question from the jury stated:

> "...If the question is MERELY AN ACADEMIC ONE, THEY DON'T HAVE A RIGHT EITHER (1) TO ASK IT AND (2) I DON'T HAVE A RIGHT TO TELL THEM THE ANSWER."(T.Tr. 1672 (Emphasis added)

Appellant Zinni respectfully contends that if the Trial Judge had followed his own advice the prejudice created by the answer actually given would have been prevented.

A third alternative would have been for the Court to sever the appellant Zinni's trial and declare a mistrial and order a new trial.

In United States v. Guanti 421 F.2d 792 (2nd Cir. 1970) the jury requested a rereading of Dominick Romano's defense counsel's summation which had dealt mainly with the withdrawal of his client. The court refused to give it because the summation was not part of the evidence. Instead the Trial Court gave a restatement of the elements of conspiracy with a statement of the law relating to withdrawal. The court did not give a specific charge as to Romano since fear that that would suggest that withdrawal was the only issue as to him or that his guilt was questionable. It should be emphasized that Romano's defense was withdrawal from the narcotic conspiracy and the running of the statute of limitations.

Appellant Zinni's contention is that if the Trial Court had acted in the same Judicial manner that the Guanti court did in protecting Romano's right to a fair trial, it would have refused to answer the question and avoided the prejudice caused BY READING BORELLI THE TRIAL COURT GAVE ITS APPROVAL TO THE JURY SPECULATING ON AN ISSUE NEVER RAISED IN THE TRIAL.

The Trial Court also gave the jury a supplemental charge:

> "I CHARGE YOU THAT THERE WAS NO EVIDENCE IN THE CASE OF ANY NEW CONSPIRACY BEING FORMED, ASSUMING THAT YOU FOUND A CONSPIRACY WAS FORMED PREVIOUSLY." (T.Tr. 1699) (Emphasis added)

This charge was in direct conflict with the Trial Court's answer to the previous jury question.

> "QUESTION--IS IT POSSIBLE TO FIND ONE DEFENDANT GUILTY OF CONSPIRACY RESULTING IN DEATH AND THE OTHER GUILTY OF CONSPIRACY NOT RESULTING IN DEATH?" (T.Tr. 1684)
>
> "(Answer) YES, T.F.M." (T.Tr. 1684) (Emphasis added)

A jury is presumed to follow the Court's instructions, United States v. Kellerman 431 F. 2d 319 (2nd Cir. 1970). In reviewing the Trial Court's supplemental charge or answer to the jury's question, the Appellate Court views it in the

context of the entire proceedings, Cupp v. Naughten 414 U.S. 141, 94 S.Ct. 396 38 L.Ed. 2d 368 (1973). THE PROBLEM IS WHICH INSTRUCTION DOES THE JURY FOLLOW WHEN THE TRIAL COURT GIVES CONFLICTING INSTRUCTIONS!

In Stump v. Bennett 398 F. 2d 111 (8th Cir. 1968), the Court was faced with a similar situation:

> "...The jury is told that before it can acquit the defendant by reason of this defense [alibi] the defendant must establish it by the preponderance of the evidence. Yet the jury is also told that if any evidence creates a reasonable doubt as to the crime as a whole, then it can return a verdict of not guilty." at 116.

The Court reversed the verdict because the confusion created was so oppressive as to affect the due process clause.

Appellant Zinni respectfully contends that his convictions must be reversed for the same reason. The Trial Court had on one day told the jury that was possible from the evidence to find two conspiracies (one resulting in death and the other not resulting in death) and then the Court on the next day charges the jury that there is, if one is proved, only one conspiracy. WHICH INSTRUCTION DOES THE JURY FOLLOW? Added to this confusion was the reading from Borelli, (supra), on withdrawal which was an issue never raised in the entire trial. The confusion so prejudiced and tainted the jury's deliberation that it was a denial of due process. The Court must grant the appellant a new trial.

CONCLUSION

Based upon the foregoing, appellant Zinni respectfully requests that this Honorable Court reverse the finding of the Trial Court or in the alternative, grant him a new trial.

By His Counsel,

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February 17, 1975

A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Re: United States v. Nicholas D. Zinni et al--#74-2649
Re: United States v. Nicholas D. Zinni et al--#74-1941

Dear Sir:

Enclosed please find original and three copies of the appellant's brief and appendix in connection with both of the above-captioned matters.

I hereby certify that copies of the foregoing briefs and appendixes have been delivered in hand this day to Messrs. Paul E. Coffey, Hubert Santos, and James Wade; and copies of same have been mailed postage prepaid this day to Raymond Daniels, Esquire.

Very truly yours,

C. Thomas Zinni

C. Thomas Zinni

CTZ/s
Enclosures
cc: Paul E. Coffey, Esquire